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IN THE

Supreme Court of the United States

No. 419

In the Matter
of
DONALD O'BRIEN and WILLIAM C. MURPHY,
Appellants,

vs.

COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,
Respondent.

JURISDICTIONAL STATEMENT

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,
Respondent.

JURISDICTIONAL STATEMENT

1. Introductory Paragraph.

The appellant, William C. Murphy, is appealing from an order of the Court of Appeals dated March 27, 1958, entered in the office of the Clerk of the Supreme Court, Albany County, on the 25th day of April, 1958, upon a remittitur from the Court of Appeals, which said order dismissed an appeal to the Court of Appeals "upon the grounds that no constitutional question is directly involved."

The appeal herein is taken only by William C. Murphy. Donald O'Brien, the co-appellant with William C. Murphy in all proceedings in the State of New York, died at Ellicottville in or about the month of February, 1959.

The title of the action and all proceedings, appeals and reported decisions in New York State are found under the title "In the Matter of Donald O'Brien, *et al.*", O'Brien being the first named petitioner. The title to the action here has been continued as the same is to be found in all prior proceedings and reported decisions primarily for the purpose of continuity.

2. Citations to Opinions Below.

Opinions rendered in action and citations to all reported proceedings are listed in chronological order of development as follows:

Opinion, Commissioner of Education (Nov. 16, 1955), 76 State Dept. Reports 134;

Opinions (Memorandum); Supreme Court, per Hamm, J. (March 1, 1956), unreported. Set forth in Appendage "B" and "C";

Opinion, Appellate Division, 3d Dept., per Halpern, J. (March 21, 1957); 3 A. D. 2d 321;

Opinion, Court of Appeals, per Fuld, J., and concurring opinion, Van Voorhis, J. (March 27, 1958), 4 N. Y. 2d 140, Set forth in Appendage "D";

Leave to appeal to Court of Appeals denied by Appellate Division, 3d Dept. (May 23, 1958), 6 A. D. 2d 745;

Leave to appeal to Court of Appeals denied by Court of Appeals (Oct. 16, 1958), 5 N. Y. 2d 707;

Motion for reargument in Court of Appeals denied by Court of Appeals (May 14, 1959), 6 N. Y. 2d 882.

3. Jurisdiction.

(A). The suit herein is a proceeding instituted under Article 78 of the Civil Practice Act of the State of New

York to review and annul a decision of the Commissioner of Education, sustaining a special election held in the Central School District No. 1, Ellicottville, Cattaraugus County, New York, for the purpose of authorizing the construction of a junior-senior high school, and the imposition of a tax of $1,260,000.00 upon the taxable real property in the Central District to pay for it.

(B). The order sought to be reviewed is the order of the Court of Appeals which dismissed an appeal taken to that Court "upon the ground that no constitutional question is directly involved". The aforesaid order is dated the 27th day of March, 1958, and was filed in the office of the Clerk of the Supreme Court, Albany County, on the 25th day of April, 1958, upon the remittitur to that Court from the Court of Appeals. The order is set forth in Appendage "E".

Following the entry of the order of the Court of Appeals dismissing the appeal taken as of right, the appellants duly and timely sought leave to the Appellate Division, Third Judicial Department, for leave to re-appeal to the Court of Appeals. Leave to re-appeal was denied by the Appellate Division, Third Department, and an order to that effect was entered in the Office of the Clerk of the Supreme Court, Albany County, on the 23rd day of July, 1958.

The appellant then duly and timely sought leave to re-appeal to the Court of Appeals from the Court of Appeals, which said leave was denied by the Court of Appeals by an order entered in the office of the Clerk of Supreme Court, Albany County, on the 31st day of October, 1958. A copy of the order with notice of entry was served upon appellant on November 3, 1958.

The appellant then duly and timely brought a motion for reargument and rehearing in the Court of Appeals. This motion was denied by the Court of Appeals on May 14, 1959.

Notice of appeal to the Supreme Court of the United States was duly and timely filed with the Clerks of the Court of Appeals, Appellate Division, 3rd Judicial Department and Supreme Court, Albany County, on July 28, 1959, following the denial by the Court of Appeals of the motion for reargument and rehearing. The timely motions for leave to re-appeal and for rehearing and reargument tolled the three months' period. (See Supreme Court Practice, Second Edition, Revised Rules by Robert L. Stearn and Eugene Gressman, 1954, page 164 and cases cited therein.)

(C). The jurisdiction of the Supreme Court of the United States to hear this appeal rests upon 28 U. S. C., § 1257, Subdivision (2).

(D). Authority which sustains the jurisdiction of the Supreme Court of the United States is:

(1) 28 U. S. C., § 1257, Subdivision (2);

(2) *Matthews v. Huwe*, 269 U. S. 262, 46 S. Ct. 108, 70 L. Ed. 266;

(3) Ohlinger's Federal Practice, Revised Edition, Volume 1, 28:1257 (2,3), page 502;

(4) Compare *Ellis v. Dixon*, 349 U. S. 458, 75 S. Ct. 850, 99 L. Ed. 1231, an action involving a review of a decision of the Commissioner of Education of the State of New York, wherein the appellant to the Supreme Court of the United States there appealed to that Court after the Court of Appeals had denied leave to appeal as contrasted with the appellant herein, who has prosecuted an appeal to the Court of Appeals as of right, where "there is directly involved the construction of the Constitution of the State or of the United States". New York Constitution Article VI, § 7 (1), New York Civil Practice Act, § 588. In particular, comments Mr. Justice Harland, contained in footnotes 4 and 5, 75 S. Ct. 850 at 853.

4. The Statutes Involved.

There are involved in this action the following statutes of the State of New York and the following Rules of the Commissioner of Education of the State of New York:

§ 2037 of the Education Law, McKinney's Consolidated Laws of New York, Book 16, page 653;

§ 310 of the Education Law, McKinney's Consolidated Laws of New York, Book 16, Page 166 and following;

§ 311 of the Education Law, McKinney's Consolidated Laws of New York, Book 16, page 193;

Rule 18 of the Rules and Practice of the Commissioner of Education, Handbook 1 (1955), page 19;

Rule 8 of the Rules and Practice of the Commissioner of Education, Handbook 1 (1955), page 13;

§ 1295, Gilbert Bliss Civil Practice of New York, Vol. 6-b page 104;

§ 1296, Gilbert Bliss Civil Practice of New York, Vol. 6-b, page 109;

all of which are set forth in Appendage "A" hereto.

5. Questions Involved.

1. Is it a violation of procedural due process contrary to the provisions of XIV Amendment to the United States Constitution to permit the Commissioner of Education to decide a dispute arising from a school district election involving the imposition of a tax upon real property without preliminarily granting to the disputants a fair and open hearing upon contested material issues of fact?

2. Is it a violation of procedural due process contrary to the provisions of XIV Amendment to the United States Constitution to permit the Commissioner of Education to decide a dispute arising from a school district election wherein 24 more people participated than were authorized under the poll list and the proposition voted upon was

carried by a majority of eight votes without preliminarily granting to the disputants a fair and open hearing upon contested material issues of fact?

3. Is it a denial of equal protection of the laws to sustain as valid over objection a special school election wherein twenty-four more people participated than were authorized under the poll list and the proposition voted upon was carried by a majority of eight votes?

4. Is it a violation of procedural due process contrary to XIV Amendment, United States Constitution, for the Courts of the State of New York, in a proceeding seeking to judicially review a decision of the Commissioner of Education which was made without a fair and open hearing to fail and refuse to grant to the parties to the judicial proceeding a trial on the disputed issues of fact raised in the judicial proceeding?

5. Is it a violation of procedural due process contrary to XIV Amendment, United States Constitution, for the Courts of the State of New York, in a proceeding seeking to judicially review a decision of the Commissioner of Education made without a fair and open hearing to fail and refuse to examine the proceedings before the Commissioner of Education so as to determine whether there was any evidence to support the decision of the Commissioner and whether such decision was against the weight of evidence?

6. What are the constitutional limitations, if any, upon the right of any state to delegate to an administrative agency, the power to decide all disputes arising from the acts or decisions of any school officer, school authority, school meeting or school election?

7. What are the constitutional limitations, if any, upon the administrative agency delegated by a state the power

to decide all disputes arising from the acts or decisions of any school officer, school authority, school meeting or school election?

8. What are the constitutional limitations, if any, upon the right of any state to prohibit or curtail a judicial review of the determination of an administrative agency which has been delegated the power to decide all disputes arising from the acts or decisions of any school officer, school authority, school meeting or school election?

6. Statement of the Case.

On May 20, 1955, a special meeting of the voters of Central School District No. 1 of the Towns of Ellicottville, Great Valley, Humphrey, Franklinville, Mansfield, and East Otto, Cattaragus County, New York, was held to vote on the proposition for a site and for the erection of a junior-senior high school. The estimated cost of the new school was $1,260,000.00.

The election was conducted by the use of two voting machines which were located at the high school in the Village of Ellicottville.

At the conclusion of the election, it appears without dispute that the total number of voters on the public counter was 1461, that the total number of voters on the poll list was 1437, and the total of the positive votes cast was 1400, consisting of 704 "yes" votes and 696 "no" votes.

The election was declared to have been carried in favor of the submitted propositions by a majority of eight votes.

Prior to the election, the majority members of the Board of Education had caused a form letter to be prepared at district expense which lauded the efforts of the Board of

Education, disparaged all who opposed them, and urged the voters to vote "yes" on the proposition (See Exhibit "G", attached to petition to Commissioner of Education). This letter was distributed to the electorate by the school children.

Prior to the election, the Board of Education caused to be prepared a formal brochure at a cost to the taxpayers of the district of $459.09. No mention of the arguments advanced against the proposition, and in particular, against the proposed site were included in the brochure. This brochure, by photograph, indicated that the choice of the electorate was either a continuation of the present inadequate facilities or an adoption of the submitted proposition. It urged the voters to "vote yes May 20, 1955" (See Brochure, Exhibit 2, attached to Answer of William C. Murphy to Commissioner of Education).

The brochure further stated on Page 4 thereof that the new proposed school would contain "six grade rooms for the fifth and sixth grades of the district" and that "all pupils in grade 5-12 in the entire district will be in attendance in this building" (See Exhibit 2 attached to Answer of William C. Murphy to Commissioner of Education).

Prior to the election, the Board of Education caused to be distributed to the electorate a letter advising that the school buses would be utilized for the transportation of voters to the polls (See Exhibit "D" attached to Petition to Commissioner of Education). Following inquiry of an elector, the Commissioner of Education of the State of New York advised by a telegram dated May 19, 3:55 P. M. that the use of school buses for the election on May 20, 1955, was illegal (See Exhibit "E" attached to Petition to Commissioner of Education). On the date of the election, school buses were used.

Prior to and during the election, there was placed upon a bulletin board in the immediate vicinity of the polls a large photograph exhibit consisting of a photograph of a barnlike structure, an architect's design of a new school, and the statement beneath "What building would you have your child go to? Think twice before you cast your ballot" (See Exhibit "H" attached to Petition to Commissioner of Education). The photograph and the architect's design comprising the exhibit were duplicates of those contained in the brochure which uncontrovertedly was prepared by the Board of Education.

Upon the date of the election, the Clerk of the school district acted as Clerk of the election and maintained the poll list. No other clerks or assistant clerks were elected during the election. During the absence of the Clerk of the Election, it appears from the affidavit of the Clerk that the maintenance of the poll list was undertaken by a teacher named Helen Bartholomew. No reference to her qualifications to act nor her actions appear in the record.

Following the election and on June 17, 1955, Donald O'Brien appealed to the Commissioner of Education from the action taken at the election. The basis of the appeal was, in the main, two—objection that 1461 opportunities to vote had been permitted to an electorate of only 1437—objection that the conduct of the Board was illegal and unfair.

Following service of the petition upon the Board of Education, that Board divided into two factions. Six members of the Board, constituting the majority, filed a verified answer denying the issues raised in the petition. One member, William C. Murphy, filed a verified answer admitting all allegations in the petition and praying in such answer for the relief asked for by the petitioner.

On August 8, 1955, attorneys for the appellant, Donald O'Brien, for the majority members of the Board of Education and for the minority member of the Board appeared in Albany before the Commissioner of Education. No hearing was held. The Commissioner did condescend to permit oral argument which is discretionary with him. Subsequently, the Commissioner again exercised his discretion and permitted the filing of briefs by the parties to the controversy (See Rules of Commissioner of Education, Hand book No. 1, Rule 18a).

On or about November 16, 1955, the Commissioner rendered his decision (Reported 76 State Dept. Reports 134), dismissing the appeal.

By petition verified on November 22, 1955, a proceeding under the provisions of Article 78 of the Civil Practice Act was commenced by both Donald O'Brien and William C. Murphy as appellants, to review the decisions of the Commissioner of Education. The petition urged violation of provisions of both the State and Federal Constitutions. Upon the return date of that proceeding, the majority members of the Board of Education sought to intervene as an interested party. No hearing on disputed issues of fact was had by Special Term. The proceeding was not referred to the Appellate Division, Third Department, by the trial justice.

On or about April 2, 1956, the Honorable Herbert D. Hamm, Justice of the Supreme Court, rendered a memorandum opinion (unreported) and signed an order dismissing the petition (Printed Record to Appellate Division, Fols. 16-36). Justice Hamm also, in a memorandum decision signed an order refusing intervention by the Board of Education (Printed Record to Appellate Division, Fols.

37-40), on which memorandum an order was subsequently made and filed.

Notice of appeal from the order made by the Honorable Justice Hamm was duly served and filed on or about May 11, 1956 (Printed Record to Appellate Division, Fols. 4-15). The appeal specifically raised constitutional questions (Printed Record to Appellate Division, Fol. 13).

An order entered upon an opinion of the Appellate Division, Third Department, by Honorable Philip Halpern (Reported in 3 A. D. 2d 321), affirmed the decision of Special Term. Thereafter, an appeal was taken to the Court of Appeals, following which an order permitting the appeal to be prosecuted upon limited record and briefs was granted by that Court.

The appeal to the Court of Appeals was taken solely on the grounds that the appellants were relying upon questions directly involving the construction of the provisions of the Constitutions of the State of New York and the United States of America (See Notice of Appeal to Court of Appeals dated April 24, 1957, and found in typewritten papers entitled "Additional Papers" attached to Printed Record before the Appellate Division).

Argument before the Court of Appeals was had on January 13, 1958. Decision of the Court of Appeals dismissing the appeal on the grounds that the same did not directly involve the construction of the State of New York or Federal Constitutions was set forth in 4 N. Y. 2d 140, Opinion by Fuld, J., and in concurring opinion, Van Voorhis, J.

Order of the Court of Appeals dismissing the appeal was entered under remittitur of the Court of Appeals in the office of the Clerk of Supreme Court, Albany County, New

York. It is from this order that appeal to the Supreme Court of the United States is taken.

Subsequently, application was duly made to the Appellate Division, Third Department, for leave to re-appeal to the Court of Appeals. This motion was denied (See 6 A. D. 2d 745). Within thirty days thereafter, application by motion to the Court of Appeals for leave to re-appeal to the Court of Appeals was made. This motion was denied. See 5 N. Y. 2d 707. Finally motion for reargument and rehearing was duly made in the Court of Appeals. This motion was denied on May 14, 1959 (See 6 N. Y. 2d 882).

Within ninety days of the last order, notice of appeal to Supreme Court of the United States was duly filed with the Clerks of the Court of Appeals, Appellate Division, Third Department and the Supreme Court, Albany County on July 28, 1959.

7. Argument.

The School Election Involved the Imposition of a Tax Upon Appellant's Real Property. Accordingly, it was Subject to the Constitutional Restriction of the "Due Process" Clause of XIV Amendment to the United States Constitution.

The proposition which was submitted to the electorate called for the imposition of a tax in the amount of $1,260,000.00. The tax was to be levied "upon taxable real property of said school district" (Proposition of special election). If the proposition passed, the tax was imposed. Collection and payment would later be correlated with the payments due upon the bonds issued to finance the construction. Failure to pay the imposed tax would result in a legally enforceable lien upon the taxpayers' real estate not dissimilar to a mortgage or judgment (*Stewart v. Palmer*, 74 N. Y. 183, 195).

The right not to have real estate taken away by the imposition of a tax for a local improvement of a new school is a property right falling within the protection of the "due process" clause of XIV Amendment, conclusion of the Court of Appeals herein to the contrary notwithstanding.

(*Davidson v. New Orleans*, 96 U. S. 97, 105, 24 L. Ed. 616;
Hagar v. Reclamation District No. 108, 111 U. S. 701, 712; 4 S. Ct. 663; 28 L. Ed. 569;
The Railroad Tax Cases, 13 Fed. 722, 752 (error dismissed 116 U. S. 138; 6 S. Ct. 317; 29 L. Ed. 589);
Stewart v. Palmer, 74 N. Y. 183, 188;
Peo. ex rel. Bridgeport Saving Bank v. Feitner, 191 N. Y. 88, 97;
City of New York (801-815 East New York Avenue), 290 N. Y. 236, 240).

The Voting Practice Authorized and Approved in this Action Denied Appellant Equal Protection of the Laws in Violation of XIV Amendment to the United States Constitution.

The State of New York, through its Legislature, accorded the qualified voters of the school district the right to vote in the special election (See §§ 401 and 2021, Subd. 7, Education Law; §§ 37.00 and 104.00 Local Finance Law).

While there may be doubt as to whether or not there is a constitutional right to vote in such an election, there can be no doubt that having been granted the right to vote, there are constitutional restrictions on curtailing its exercise.

Once accorded the vote, "The constitution requires that all elections be free and equal, which means that the vote

of every qualified elector shall be equal in influence with that of every other one" (*O'Connor v. Board of Education*, 288 Ill. 240, 123 N. E. 233). (See also *Peo. ex rel. Hotchkiss*, 206 N. Y. 231, 99 N. E. 568; *Crane v. Voorhis*, 257 N. Y. 298, 178 N. E. 169; *In re Carellier*, 159 Misc. 212, 287 N. Y. S. 739).

It is uncontradicted in this action that the public counters on the election machines were inspected before the election and set at zero. The public counters totalled 1461 at the conclusion of the election. The poll list totalled 1437. Simple mathematics discloses that twenty-four more people participated than under the poll list were eligible. These twenty-four, whoever they may be, were unauthorized and illegal participants.

An election practice which permits the vote of a legal voter to be watered down by the votes of illegal voters is not one which permits the vote of a qualified voter to be equal in influence with that of other qualified voters. Such practice denies qualified voters equal protection of the laws, in violation of XIV Amendment, United States Constitution.

Controversy over the Conduct and Fairness of the Election Arose on Several Scores. They are Contained in the Pleadings Filed Before the Commissioner of Education and Concern Themselves With Such Fundamental Material Issues that Resolving them was Essential to any Fair, Intelligent Judicial Decision.

First, there was included in the petition and premised upon an accompanying affidavit of the sales manager of the Jamestown Voting Machine Company an allegation that the mechanics of the voting machines were such that it was mechanically impossible for the public counter (a device recording the number of voters presented an op-

portunity to vote) to record except upon a complete opening and closure of the voting machine handle, and that no jiggling or partial movement of the handle could possibly make the public counter record (See Paragraph 16, Page 5, Petition to Commissioner of Education).

The answer of the appellants Murphy, admitted this allegation (See Answer, William C. Murphy to Commissioner of Education). The verified answer of the majority members of the Board of Education denied the allegation (See Paragraph 3 of Answer of William Laidlaw, *et al.*, to Commissioner of Education). No affidavit or other proof in support of the naked denial was presented.

A determination of this factual issue was essential. It was a prerequisite to determining why twenty-four more participants were recorded on the public counters than on the poll list. It was a factual keystone in determining whether unauthorized voters (whether unregistered or registered but voting more than once) had participated in the election.

There has never been a determination of this issue. The Commissioner of Education did not decide it. He stated, "I do not attempt to resolve the mystery of the difference in the various totals." (See Decision of Commissioner of Education). Nor did any of the three subsequent reviewing courts decide this issue.

A second fundamental factual issue concerned itself with whether or not the handle of the voting machine pulled out before the voters had voted. Affidavits attached to the answer of the majority members of the Board of Education explained that tension on the handle of the machine pulled the same out of position at a time when the machine could receive a vote. The same affidavit stated that this

pulling out of the handle occurred before the voter had voted once on the machine.

Petitioner O'Brien and the appellant here, Murphy, asserted that such affidavits constituted no proof on the vital question of whether non-registered voters voted or registered voters voted more than once, this for the reason that the affidavits were not from participating voters but from election officials who did not and could not have personal knowledge of such a fact by reason, first, that the vote was, as required by law, secret, and the voter hidden from view of officials by a drawn curtain on the machine, and secondly, that by law, all counters registering votes on the machine were required to and did remain sealed until the conclusion of the election. In addition, the affidavits were completely silent on the number of times which the handle pulled out of voting position, and consequently, did not explain the discrepancy of twenty-four excess participants. Further, the affidavit of the voting machine attendant attached to the answer stated that the handle pulled out on only one of the two machines used, while the public counter exceeded the recorded vote on both machines employed. Finally, for a one-half hour period, a wholly unauthorized person took charge of maintaining the poll list without any evidence that during such time, she kept "a true and accurate record of all proceedings" as required by § 2027, Subdivision 4, of the Education Law.

In brief, the petition of O'Brien and the answer of Murphy indicated the impossibility of knowledge that authorized persons had not voted more than once or that unauthorized persons had not voted at all, whereas the answer of the majority of the Board asserted such knowledge.

No specific finding has ever been made on this factual issue. Its importance is indicated by the fact that the Commissioner of Education, in two prior decisions, voided an election where it appeared that individuals in excess of the poll list had participated in a school election.

(*Matter of District 13, Town of Huntington*, 58 State Dept. Reports 461 (1937);
Matter of District 6, Town of Babylon, 64 State Dept. Reports 133 (1941).)

Common sense is more compelling. Admittedly, the machine could have received a vote before the handle "pulled out". The situation was fraught with fraud. One barefaced liar could have offset an entire ward of opposition voters merely by repeatedly declaring "The handle pulled out before I voted". In such a situation, the fruits of an election could go to the most daring and not the most popular.

Three other material essential issues of fact were raised in the pleadings before the Commissioner. The petition charged that the Board of Education had caused to be prepared and distributed by school children a letter which lauded the work of the Board of Education, disparaged the opponents of the proposition, and urged the parents to vote "yes" upon the proposition (See Paragraph 24, Page 7, Petition to Commissioner of Education). This allegation was admitted in the answer of William C. Murphy, but was denied in the answer of the majority of the Board of Education (See Paragraph 6, Answer to the Commissioner of Education, Majority Members of the Board of Education).

Based upon a photograph accompanying the petition, petitioner also alleged that a large photograph of a barn

next to that of the proposed school building was exhibited at the polling place (See Paragraph 5, Page 8, Petition to the Commissioner of Education). The answer of the majority members of the Board of Education, Paragraph 7, denied the allegation.

It was also alleged in the petition to the Commissioner, in Paragraph 23, that despite the delivery of a telegram from the Commissioner of Education that the use of school buses to transport electors to a school meeting was, in the opinion of the Commissioner, illegal, such buses were nevertheless used for the transportation of voters to the special election. Paragraph 5 of the Answer of the majority members of the Board of Education denied this allegation. Nothing other than denials were offered to disprove the allegations. Unimpeached evidence as to facts may not be arbitrarily discredited (*Wilson v. Folsom*, 151 F. Supp. 195). Failure of an administrative agency to consider evidence before it is arbitrary (*Lloyd Sabaudo Societa Anonima Per Azioni v. Elting*, 287 U. S. 329, 339, 53 S. Ct. 167, 77 L. Ed. 341). No finding of fact has ever been made in regard to these three issues of fact.

That such issues were essential, material, fundamental and controlling is indicated in the opinion by William Brennan, J. (now Justice of the Supreme Court of the United States) in *Citizens to Protect Public Funds, et al. v. Board of Education of Parsippany Troy Hills Township*, 98 Atlantic 2d 673, Supreme Court, New Jersey (1953), wherein conduct far less partisan and censurable was sufficient to invalidate a school district bond issue (See also *Elsenare v. Chicago*, 334 Ill. 78, 167 N. E. 129).

The Parties were Compelled to Submit Their Controversy to the Commissioner of Education for Determination.

§ 2037 of the Education Law of New York mandates "all disputes concerning the validity of any district meeting or election * * * shall be referred to the Commissioner of Education for determination, and his decision in the matter shall be final and not subject to review". One aggrieved has no initial choice between administrative agency or the judiciary. Application to the Courts, at least in the first instance, is barred (*Finley v. Spaulding*, 274 A. D. 522 (Third Dept. 1948); *Markert v. Wilson*, 284 A. D. 1068 (Third Dept. 1954)).

Acting Under the Authority of Self-Promulgated Rules which Prevent the Full Joinder of Issue and Disallow a Hearing and Conflict With an Express Statute, the Commissioner of Education Entertained the Proceeding.

§ 310 of the Education Law, as well as § 2037, authorized an appeal or petition to the Commissioner of Education. Under the terms of § 310, the Commissioner is "required to examine and decide the same". § 311 of the Education Law, Subdivision 1, authorizes the Commissioner "to regulate the practice therein". By virtue of this latter provision, the Commissioner has promulgated and adopted rules of practice (See Rules of Commissioner of Education, Handbook 1).

Under those rules, a petition alleging the facts giving rise to the grievance or alleged error is to be filed with the Commissioner by the person aggrieved, and a copy thereof is required to be served upon the Board of Education and such others as the situation requires. An answer is then prepared by the respondent, Board of Education,

admitting or denying the facts alleged in the petition. Exhibits may be attached to both the petition and the answer (See Rules of the Commissioner of Education, Handbook 1).

Following the filing of the answer with the Commissioner, the next procedural step is the rendering of a decision by the Commissioner of Education. Nothing intervenes. No opportunity to present evidence is afforded. There is no right to reply to allegations contained in the answer. No right to examine and cross examine witnesses is afforded. No hearing is held. In fact, an opportunity to argue the matter orally is not guaranteed, but it, like the right to submit briefs, is discretionary with the Commissioner.

> "8. No reply, replication or rejoinder shall be allowed except by permission of the Commissioner of Education."
>
> "18 (a). Submission of appeals may be made upon the papers filed therein, with or without oral argument, or the filing of briefs as the Commissioner, upon application, may determine".

(Rules 8 and 18 (a), Rules of the Commissioner of Education, Handbook 1.)

The rules of the Commissioner completely eliminate from reference or application the provisions of § 2215, Subdivision 12, of the Education Law which provide:

> "A district superintendent of school shall have the power and it shall be his duty (12) to take and report to the Commissioner of Education, under the direction of such Commissioner, testimony in a case on appeal * * * ".

This section continues by stating the right of subpoena is available to the Superintendent, and further outlines the manner in which such testimony and hearing is to be

held. § 2215, Subdivision 12, was enacted by the Laws of 1910, and has been continued through six amendments and revisions of the Education Law and is still contained therein.

In 1947, Rules of the Commissioner of Education set forth provisions of § 2215, Subdivision 12, and then the explanation and comments of the Commissioner concerning it, which comments stated the purpose of the section was "• • • to enable the Commissioner of Education to obtain additional light where the written evidence is conflicting, ambiguous or otherwise unsatisfactory, by the oral examination of witnesses before a superintendent". Following 1947, the Rules of the Commissioner omitted all reference to the subdivision.

The Commissioner admittedly does not follow the practice of referring matters to district superintendents. Neither admittedly does he hold a hearing before himself on disputed issues of fact (See Petition, Article 78, Supreme Court, Fols. 71-73; Answer of Commissioner, Fols. 104, 105).

The Proceedings Before the Commissioner of Education Were of a Distinct Judicial and not Administrative Nature.

Both § 310 and § 2037 of the Education Law respectively mandate the Commissioner of Education "to examine and decide" an appeal or petition; to refer election disputes to him "for determination • • • and decisions".

In *Matter of Craig v. Board of Education of City of New York*, 173 Misc. 969, Supreme Court, New York County, it was held that the language of § 890 (now 310), Education Law "clearly shows that the Commissioner's determination under that section is of a judicial character."

The decision confirms this view by the analysis of New York Court decisions holding that the rulings and decisions of the Commissioner are adopted by the Courts as *res adjudicata*, are conclusive, and that resorts to the Court for orders in aid of execution of his decisions may be had. To the same effect that exercise of the right to decide is a judicial act is *Pope v. United States*, 323 U. S. 1, 65 S. Ct. 16, 89 L. Ed. 3, wherein the Court observed, at page 23: "Jurisdiction to decide is jurisdiction to make a wrong as well as a right decision" (See also *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 136; 71 S. Ct. 624, 630; 95 L. Ed. 847).

Here, as in *Morgan v. The United States*, 304 U. S. 1, 58 S. Ct. 773, 82 L. Ed. 1129, Opinion Chief Justice Hughes, the proceeding was of an "adversary character"; it had "all the essential elements of a contested litigation"; all parties were represented by counsel, and the real property of the appellant was put in jeopardy. Accordingly, it was judicial. Here also, the Commissioner was declaring rights on present or past facts under laws already existing, as opposed to making a new rule to be applied thereafter. This is the line of demarcation between judicial and administrative (*Prentis v. Atlantic Coast Line*, 211 U. S. 210 at 226, 29 S. Ct. 67, 53 L. Ed. 146).

Reference to the nature of the consideration presented confirms the judicial function. *Peo. v. City of Brooklyn*, 9 Barb. 535, 542, held that confirmation of an assessment for an improvement was an exercise of judicial authority. In *Peo. ex rel. Haverly v. Hanes*, 44 Misc. 475, it was held that in determining what ballots shall be counted for or against any question, inspectors of election act judicially.

Since (1) the exercise of the Commissioner's power of decision was conditioned upon the ascertainment of the

operative facts from evidence; (2) he was required to act on the facts not in any way which the law specifically required, but was given discretion; (3) his decision determined an existing controversy under the law as distinguished from promulgation of rules and policy governing future conduct, he was acting judicially.

(*Pennsylvania R. Co. v. New Jersey State Aviation Commission*, 2 N. J. 64, 75 A. 2d 61, 63; *Nebraska Mid-State Reclamation District v. Hall County*, 162 Neb. 410, 41 N. W. 2d 397, 410; *Manor, etc. of Union Point v. Jones*, 88 Ga. App. 848, 78 S. E. 2d 348, 350).

The Commissioner of Education was Required to Hold a Fair and Open Hearing Which Would Include the Right to Present Evidence, to Know the Claims of Opposing Parties, and the Right to Meet Them, as well as the Right to Cross Examine Witnesses.

Leading English case, *Board of Education v. Rice* (1911) A. C. 179, 182 cited with approval in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 171; 95 L. Ed. 187.

(*Morgan v. United States*, 304 U. S. 1, 18; 58 S. Ct. 773, 82 L. Ed. 1129, 1938, Opinion Chief Justice Hughes;

Interstate Commerce Commission v. Louisville and Nashville R. R. Co., 227 U. S. 88, 93; 33 S. Ct. 185; 57 L. Ed. 431;

Matter of Hecht v. Monaghan, 307 N. Y. 461, 470).

See Administrative Law by Professor Bernard Schwartz New York Law School, 33 N. Y. U. Law Rev. 1090, 1092 (1958) criticizing decision of Court of Appeals in instant case.

Failure of the Commissioner of Education to Hold a Fair and Open Hearing was in Violation of Article XIV, Constitution of the United States.

Coe v. Armour Fertilizer Works, 237 U. S. 413, 35 S. Ct. 625, 59 L. Ed. 1027;

Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 57 S. Ct. 724, 81 L. Ed. 1093;

Morgan v. United States, 304 U. S. 1, 58 S. Ct. 773, 82 L. Ed. 1129, Rehearing denied 58 S. Ct. 999;

Mullane v. Central Hanover Bank and Trust Co., 339 U. S. 306, 70 S. Ct. 652;

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 71 S. Ct. 624, 95 L. Ed. 817;

See also:

Davidson v. New Orleans, 96 U. S. 97, 105, 24 L. Ed. 616;

Hagar v. Reclamation District No. 108, 111 U. S. 701, 711, 4 S. Ct. 663, 28 L. Ed. 569;

Interstate Commerce Commission v. Louisville and Nashville R. R. Co., 227 U. S. 88, 91, 33 S. Ct. 185, 57 L. Ed. 431;

Ohio Valley Co. v. Ben Avon Borough, 253 U. S. 287, 289, 40 S. Ct. 527, 64 L. Ed. 908;

St. Joseph Stock Yard Co. v. United States, 298 U. S. 38, 51, 56 S. Ct. 720, 80 L. Ed. 1033.

The Denial of Due Process was not Corrected but Continued in the Subsequent Judicial Proceedings Seeking to Review the Determination of the Commissioner of Education.

Judicial review of the decision of the Commissioner was sought by a proceeding brought under Article 78, Civil Practice Act, which is the only procedural method available in New York, to review an administrative determination (*Newbrand v. Yonkers*, 285 N. Y. 164, 33 N. E. 2d 75). Therein, the petitioner again alleged in a verified petition the same fundamental material issues which had been alleged in the petition to the Commissioner and attached the same evidentiary matter in support of them. The Commissioner, who had but completed a decision wherein he

stated that he had not and could not resolve such issues, filed a verified answer denying the allegations. The petition charged, in accordance with § 1296, Subdivisions 6 and 7, Civil Practice Act, respectively, that there was no competent proof of all of the facts necessary to authorize the making of the determination, and that there was such a preponderance of proof against the facts that a verdict of a jury affirming them would be set aside as against the weight of evidence. The petition further charged that the failure of the Commissioner to hold a hearing was in violation of Article XIV of the Constitution of the United States.

The trial Court refused to consider either the questions of competency or preponderance of proof or grant a hearing because § 1296 of the Civil Practice Act requires the proceeding involving those two issues to be "transferred for disposition to a term of the Appellate Division" (§ 1296, Civil Practice Act).

The subsequent review in the Appellate Division does not include these two items or entitle one to a hearing in that Court because "Subdivisions 6 and 7 of § 1296 * * * have no application if the determination was not made as the result of a hearing held and at which evidence was taken pursuant to statutory direction" (*Matter of Kuhn*, 1 A. D. 2d 533 at page 538, Leave to appeal denied, 2 N. Y. 2d 749). Thus, the failure of the Commissioner to perform his constitutional duty and hold a hearing is presented as the reason which prevents the Courts from performing their duty.

The result is that the facts and the evidence or absence of it supporting them in a proceeding are made judicially sacrosanct. The Commissioner's determination was viewed by the courts with the finality accorded pronouncements of

the Oracle of Delphi. The evil of such practice was pointed out tersely by Chief Justice Hughes in *Crowell v. Benson*, 285 U. S. 22 at 57, 52 S. Ct. 285, 76 L. Ed. 598, as follows:

> "That would be to sap the judicial power as it exists under the Federal Constitution and to establish a government of a bureaucratic character alien to our system wherever fundamental rights depend, as not infrequently they do depend, upon the facts and finality as to the facts becomes in effect finality in law."

Whether or not there was evidence to support the administrative determination is a question of law and must be open for judicial consideration.

Crowell v. Benson, 285 U. S. 22 at 46-50, 52 S. Ct. 285, 76 L. Ed. 598;

St. Joseph Stock Yard Co. v. United States, 298 U. S. 38, at 51-53, 56 S. Ct. 720, 80 L. Ed. 1033;

Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 289, 40 S. Ct. 527, 64 L. Ed. 908;

Interstate Commerce Commission v. Louisville and Nashville R. R. Co., 227 U. S. 88, 92, 33 S. Ct. 185, 57 L. Ed. 431;

Lloyd Sabaudo Societa Anonima Per Azioni v. Elting, 287 U. S. 329 at 335, 53 S. Ct. 167, 77 L. Ed. 341;

Newbrand v. Yonkers, 285 N. Y. 164, 33 N. E. 2d 75;

Matter of O'Brien v. Commissioner of Education, 4 N. Y. 2d 140 at 152 (Concurring Opinion, Van Voorhis, J.).

In particular, see *Matter of Ellis v. Allen*, 4 A. D. 2d 343 (Third Dept., July, 1957), wherein judicial trial of factual issues was granted by the Appellate Division because the matter was not "purely an educational one". This holding followed appeal to Supreme Court of the United States by the same petitioner (see *Ellis v. Dixon*, 349 U. S. 458, 75 S. Ct. 850, 99 L. Ed. 1231).

See also, *Columbia Auto Loan, Inc. v. Jordan*, 196 Fed. 2d 568.

The petition of Congress to limit the jurisdiction of Federal Courts: An Exercise in Dialectic by Henry M. Hart, Jr., 66 Harvard L. Rev. 1362 at 1375-1379.

Judicial Review of administrative adjudicatory action taken without a hearing, 70 Harvard L. Rev. 698 at 700-701.

The requirement that the judiciary examine the weight of evidence of an administrative agency "applies when rights either of person or property are protected by constitutional restrictions".

St. Joseph Stock Yard Co. v. United States, 298 U. S. 38 at 52, 56 S. Ct. 720, 80 L. Ed. 1033;

Crowell v. Benson, 285 U. S. 22, 57, 52 S. Ct. 285, 76 L. Ed. 598;

Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 289; 40 S. Ct. 527, 64 L. Ed. 908;

Interstate Commerce Commission v. Louisville and Nashville R. R. Co., 227 U. S. 88, 93, 33 S. Ct. 185, 57 L. Ed. 431;

Tagg Bros. and Moorhead v. United States, 280 U. S. 420, 50 S. Ct. 220, 74 L. Ed. 524;

Newbrand v. Yonkers, 285 N. Y. 164, 33 N. E. 2d 75;

Matter of O'Brien v. Commissioner of Education, 4 N. Y. 2d 140 at 152 (Concurring Opinion, Van-Voorhis, J.);

Columbia Auto Loan, Inc. v. Jordan, 196 Fed. 2d 568;

Ellis v. Allen, 4 A. D. 2d 343.

The Record Clearly Indicates that the Question of a Full and Open Hearing was Raised Before the Commissioner of Education and Before the Courts.

The concurring opinion of Van Voorhis, J., recites that the appellant may have orally demanded a hearing before the Commissioner, but that he, Judge Van Voorhis, could not find anything in the record to indicate that such demand had been "made in writing". Because he did not believe that the record raised the question of a hearing before the Commissioner, his opinion, which was otherwise a dissent, concurred with the majority in a dismissal of the appeal. (*Matter of O'Brien*, 4 N. Y. 2d 140 at 158-159). This conclusion came after a learned and exhaustive fifteen page treatise of the law on the non-existent issue. The majority of the Court of Appeals did not dismiss the appeal on such tenuous grounds.

It is true that the record contains no written demand to the Commissioner for a hearing, and for a very simple reason: No opportunity to present such demand was afforded.

One cannot properly demand a hearing in the petition filed with the Commissioner, for at that point, it is unknown whether the allegations will be controverted. When an answer is filed, and it appears for the first time that material allegations are controverted, the permitted practice as established under the Rules of the Commissioner not only make no provision for filing any further writings, but in fact, provide against it.

> "No reply, replication or rejoinder shall be allowed except by permission of the Commissioner of Education * * *" (Rule 8, Rules of the Commissioner of Education, Handbook 1).

Neither the Rules of the Commissioner nor the Civil Practice Act contain any provision either authorizing the filing of a written demand for a hearing or in the alterna-

tive, providing for a proceeding to compel the Commissioner to accept such a written demand.

Following the submission of the answer, any further proceedings before the Commissioner are a matter of grace and favor (Rule 18-A, Rules of the Commissioner of Education). Even if granted, they consist of oral argument only and are not transcribed or reported. Thus, the oral demand which was made and strenuously urged is not contained in the record. However, that a demand for a hearing was made does not admit of dispute; for it was admitted by the Commissioner in a brief submitted to the Court of Appeals. (See page 7—letter brief dated January 14, 1958.)

Upon a judicial review of a decision of the Commissioner of Education, the record before the Commissioner is the basis for the review. The Commissioner is required to furnish this (§ 1291, Civil Practice Act).

To require the inclusion of a written demand addressed to the Commissioner of Education for a hearing in the record is to require the accomplishment of the impossible. To penalize for failure to perform the impossible is unfair. The only available means to seek a hearing before the Commissioner was to do the same orally, and this was done.

However, Judge Van Voorhis is incorrect in his statement that there is absent from the record anything to show that the question of a hearing was raised. The record so clearly indicates that this question was raised and at the earliest possible opportunity that we can offer no plausible explanation of the Judge's comment.

The Article 78 petition initiating the judicial review contained six express allegations concerning the absence of a hearing before the Commissioner of Education:

Paragraph 40: "That the Commissioner of Education at no time granted your petitioner a hearing."

Paragraph 51: "* * * he (Commissioner) did fail to hold a hearing and he failed to provide an opportunity to your petitioners to present evidence upon controverted issues of fact raised in the pleadings * * *".

Paragraph 52(a): "The Commissioner failed to hold a hearing".

Paragraph 52(b): "The Commissioner failed to take evidence to resolve controverted issues of fact".

Paragraph 36: "That the Commissioner of Education at no time took evidence as to the allegations of the petition which were denied and controverted in the answer * * *".

Paragraph 37: "That the Commissioner of Education at no time offered your petitioner an opportunity to present evidence as to the allegations in the petition which were denied and controverted in the answer."

The absence of a hearing before the Commissioner was the principal point urged both before trial Court and the Appellate Division. The opinions of both those courts not only confirm that the issue was raised in both Courts, but also that it was specifically ruled upon. See respectively Opinion, Supreme Court, per Justice Hamm, concluding paragraph, unreported; Case included in appendage hereto; Opinion, Third Department, Appellate Division, per Halpern, J., 3 A. D. 2d 321 at 324.

The absence of any transcript of the proceedings upon the return of the Article 78 proceeding is explained by § 1287, C. P. A., which requires such proceeding to be brought on as a motion before Supreme Court sitting in Special Term, where no transcript is kept of oral argument.

If upon the return there is a controversy concerning the evidence to support the decision of the Commissioner, § 1296, C. P. A., mandates a transfer to the Appellate Division for their ultimate determination. The record in this case affirmatively indicates that the failure of the Courts to hold a hearing in connection with the Article 78 proceeding was raised and specifically passed upon.

(See Opinion, Third Dept., per Halpern, J., 3 A. D. 2d 321, 325.)

Those Statements Contained in the Several Opinions Which Recite that had a Hearing Been Held, the Result in the Case Would be the Same Avail Absolutely Nothing.

"To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case, due process of law would have lead to the same result because he had no adequate defense upon the merits. *Rees v. Watertown*, 19 Wall. 107, 123". *Coe v. Armour*, 237 U. S. 413, at 424, 35 S. Ct. 625, 59 L. Ed. 1027 and cases cited therein. *Stewart v. Palmer*, 74 N. Y. 183.

Questions Presented are Substantial.

This case according to Judge Van Voorhis in his concurring opinion "touches one of the most fundamental legal questions of the day". 4 N. Y. 2d 140 at 159. The problem of finality and of judicial reviewability of decisions of the Commissioner of Education has repeatedly been before the Legislature of the State of New York. Twice, statutes seeking to amend the Education Law so as to provide for the same judicial review of his decisions as that of other administrative agencies in the state have been passed by the Legislature only to be vetoed by the Governor. The

finality of his determinations and the confusion surrounding such finality has repeatedly been scored by responsible groups in this State, and in particular, the National Grange.

The refusal of the New York Courts (a) to follow the prohibition against judicial review contained in §§ 310 and 2037 of the Education Law, while at the same time failing to declare such provisions unconstitutional or (b) to follow the procedure and in particular the scope of the *only* judicial review authorized by the legislature and contained in Article 78 C. P. A. instead of a new nebulous court conceived procedure and scope contained in the phrase "purely arbitrary" has left the entire question confusion confounded. The result of this legal procedural hiatus is that a petitioner to secure redress for violation of constitutional wrongs may have to prosecute appeals to the Supreme Court of the United States before the New York Courts will afford such redress. See *Matter of Ellis v. Allen*, 4 A. D. 2d 343 at 345, earlier presented to the Supreme Court of the United States in *Ellis v. Dixon*, 349 U. S. 458, 75 S. Ct. 850.

The complexity and importance of the problem involved herein, the number and variety of reasons advanced by the several Courts in defeating one seeking a judicial review of the decisions of the Commissioner of Education together with the absence of any definitive rule outlining the extent of encroachment which administrative agencies may make upon what heretofore had been understood as constitutional rights has prompted what is conceded to be this exceptionally long jurisdictional statement.

Respectfully submitted,

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APPENDIX A.

Statutes Involved.

§ 2037, Education Law, McKinney's Consolidated Laws of New York, Book 16, page 653:

"§ 2037. Determination of Meeting or Election Disputes.

All disputes concerning the validity of any district meeting or election or of any of the acts of the officers of such meeting or election shall be referred to the commissioner of education for determination and his decisions in the matter shall be final and not subject to review. The commissioner may in his discretion order a new meeting or election. Formerly § 1735, renumbered 1736, L. 1952, c. 631, § 1; renumbered 2037 and amended L. 1953, c. 801, § 35, eff. June 1, 1953."

§ 310, Education Law, McKinney's Consolidated Laws of New York, Book 16, page 166 and following:

"§ 310. Appeals or Petitions to Commissioner of Education and Other Proceedings.

Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever. Such appeal or petition may be made in consequence of any action:

1. By any school district meeting.

2. By any district superintendent and other officers, in forming or altering, or refusing to form or alter, any school district, or in refusing to apportion any school moneys to any such district or part of a district.

3. By a county treasurer or other distributing agent in refusing to pay any such moneys to any such district.

4. By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school or on any other matter upon which they may or do officially act.

5. By any trustees of any school library concerning such library, or the books therein, or the use of such books.

6. By any district meeting in relation to the library or any other matter pertaining to the affairs of the district.

7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools."

§ 311, EDUCATION LAW, MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK, Book 16, page 193:

"§ 311. POWERS OF COMMISSIONER UPON APPEALS OR PETITIONS, ET CETERA.

The Commissioner, in reference to such appeals, petitions or proceedings, shall have power:

1. To regulate the practice therein.

2. To determine whether an appeal shall stay proceedings, and prescribe conditions upon which it shall or shall not so operate.

3. To decline to entertain or to dismiss an appeal, when it shall appear that the appellant has no interest in the matter appealed from, and that the matter is not a matter of public concern, and that the person injuriously affected by the act or decision appealed from is incompetent to appeal.

4. To make all orders, by directing the levying of taxes or otherwise, which may, in his judgment, be proper or necessary to give effect to his decision."

Appendix.

RULE 18, RULES AND PRACTICE OF THE COMMISSIONER OF EDUCATION, Handbook 1 (1955), Page 19:

"18. ORAL ARGUMENT; BRIEFS

a. Submission of appeals may be made upon the papers filed therein, with or without oral argument, or the filing of briefs, as the Commissioner of Education, upon application, may determine.

b. Arguments in appeals pending before the Commissioner of Education may be held before the Deputy Commissioner of Education or the Counsel.

c. The maximum time allotted for oral argument will be 20 minutes for each party except in extraordinary cases where, upon application, the Commissioner extends such time.

d. Oral argument is the opportunity for the parties to present orally the principal arguments in support of their positions and to establish the issues. Detailed arguments should not be presented at the time of oral argument, but may be presented in written form and opportunity will be given counsel for submission of briefs. Testimony is not taken and all necessary factual matter should be presented in affidavit form or in the form of exhibits."

RULE 8, RULES AND PRACTICE OF THE COMMISSIONER OF EDUCATION, Handbook 1 (1955), Page 13:

"8. REPLY, REPLICATION OR REJOINDER. No reply, replication or rejoinder shall be allowed, except by permission of the Commissioner of Education; in which case, such reply, replication and rejoinder must be duly verified by oath, and copies thereof served on the opposite party. Immediately after the service of such copy, the original, together with an affidavit of such service, and stating the time and manner of the service, and the name and official character of the person upon whom such service was made, must be transmitted to the Education Department at Albany."

Appendix.

§1295, Gilbert Bliss Civil Practice Act of New York, Vol. 6-b, Page 104:

"§ 1295. Hearing Upon the Application.

Upon the return day of the application, if no triable issue of fact is duly raised by the pleadings and accompanying papers, the court shall forthwith render such final order as the case requires. If a triable issue of fact is duly raised, it shall be forthwith tried before a court sitting without a jury, before a referee, or where the proceeding is to review a determination or to compel performance of a duty specifically enjoined by law and a jury trial is demanded on or before the return day, before a court and a jury. The provisions of statute or rule governing references in an action shall apply to the proceeding under this article.

In the case of proceedings instituted in the appellate division, the issue of fact shall be tried before a referee or at a trial term of the supreme court in a county designated by the appellate division; and the verdict, report or decision rendered upon the trial shall be returned to, and the final order thereupon made by, the appellate division. In other cases, the place of trial shall be that named in the title of the proceeding, unless otherwise ordered by the court; and the court before which the trial is held shall have power to render the final order."

§1296, Gilbert Bliss Civil Practice Act of New York, Vol. 6-b, Page 104:

"§ 1296. Questions for Determination; When Hearing Before Appellate Division.

In a proceeding under this article, the questions involving the merits to be determined upon the hearing are the following only:

1. Whether the respondent failed to perform a duty specifically enjoined upon him by law.

2. Whether the respondent, if a body or officer exercising judicial or quasi-judicial functions, is proceeding or is about to proceed without or in excess of jurisdiction.

3. Whether the respondent, if a body or officer exercising judicial, quasi-judicial, administrative or corporate functions, had jurisdiction of the subject matter of a determination under review.

4. Whether the authority conferred upon the respondent in relation to that subject matter has been pursued in the mode required by law in order to authorize him to make the determination.

5. Whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the petitioner.

5-a. Whether the respondent abused his discretion in imposing the measure of punishment or penalty or discipline involved in the determination.

Where the determination under review was made as the result of a hearing held, and at which evidence was taken, pursuant to statutory direction, the following questions shall also be determined if the petitioner raises such questions:

6. Whether there was any competent proof of all the facts necessary to be proved in order to authorize the making of the determination.

7. If there was such proof, whether, upon all the evidence, there was such a preponderance of proof against the existence of any of those facts that the verdict of a jury, affirming the existence thereof, rendered in an action in the supreme court triable by a jury, would be set aside by the court as against the weight of evidence.

Where only one or more of the issues specified in subdivisions one to five-a inclusive, are raised, the court to which the application for relief is made shall

itself dispose of the cause on the merits. Where one of the other two issues is raised the court shall make an order directing that the proceedings be transferred for disposition to a term of the appellate division held within the judicial department embracing the county in which the proceeding is instituted. The court may, however, even in such a case, itself pass on objections to the petition in point of law, and it shall dismiss the proceeding on the merits where it appears that the petitioner is not entitled to relief because of the provisions of section twelve hundred and eighty-five or section twelve hundred and eighty-six of this article.

If the court erroneously decides that the issues in the cause are not such as to call for transfer of the cause to the appellate division, or if the converse occurs, the appellate division, shall treat the cause, when the latter comes before it by appeal or transfer, as if the proper proceedings had been taken, and shall either dispose of the issues itself, or if the papers before it are not sufficient therefor, shall remit the proceeding to the proper term or court to be disposed of.

Statements made in the answer are not conclusive upon the petitioner. Where the cause is a proper one for review by the appellate division, a triable issue as to the accuracy of completeness of the transcript of the record of proceedings annexed to the answer, shall be tried, after transfer of the proceedings to the appellate division, in the manner provided in section twelve hundred and ninety-five of this article for the trial of an issue of fact arising in a proceeding instituted in the appellate division."

APPENDIX B.

Memorandum Decision of Supreme Court, Special Term, Dismissing Article 78 Petition.

(Supreme Court, Albany County Special Term, December 9, 1955.)

(Justice Herbert D. Hamm, Presiding.)

Appearances:

Charles A. Brind, Jr., Esq., (Dr. John P. Jehu, George B. Farrington, Esq., of counsel), Attorney for Respondent.

Shane & McCarthy, Esqs., (Edward M. Horey, Esq., of counsel), Attorneys for Petitioner, Donald O'Brien.

John W. Ellis, Esq., Attorney for Petitioner, William C. Murphy.

Jeremiah J. Moriarty, Esq., Attorney for Board of Education of Ellicottville Central School District, *amicus curiae*.

HAMM, J.,

This is a proceeding pursuant to Article 78 of the Civil Practice Act to review and annul a determination of the Commissioner of Education in sustaining a special election in the Ellicottville Central School District in Cattaraugus County. The voting was on a new high school and the levy of a tax for its construction.

Two voting machines were used for the election. There were 1437 voters registered. The total of positive votes cast on the machines for and against the proposition was 1400. The poll list, to which no exception is taken, contained the names of 1437 eligible voters. The public counters on the voting machines totalled 1461.

No proof of fraud, disorder or confusion was presented to the Commissioner on the appeal. No point is made that the number of positive votes cast, 1400, was less than the number of eligible voters. This is common experience and was to be expected. The petitioners do claim, however, irregularity in the election because of the difference between the 1437 names registered on the poll list and the 1461 votes registered on the public counters.

In support of their contention the petitioners have submitted an affidavit by an employee of a manufacturer of voting machines which alleges as to voting machines in general that a voting machine is constructed so that once the handle which operates the curtain is moved in the direction of closure of the curtain, the same handle cannot be returned to the open position until the curtain has been closed and that, similarly, when the handle which operates the curtain is moved to open the curtain, the curtain cannot be returned to a closed position by the voter but the handle must be continued in the direction of opening the curtain. However, the discrepancy between the public counters and the poll list is explained adequately in the affidavit of the custodian of voting machines of the Town of Ellicottville. The custodian was appointed an inspector of election by the Board of Education. The machines used were more than twenty-five years of age. The particular machines used were equipped with a cord device attached to the release on the back of the machines. They were so equipped to avoid the necessity of the inspector's remaining at the back of the machine to operate the release by hand. When a machine is vacant

the handle required to close the curtain cannot be operated. When voters entered the machines the inspectors placed tension on the cord and release which permitted the operation of the handle. When the curtain was closed the voter could not open the curtain and vacate the machine until the inspector again placed tension on the cord and release. This released the handle and permitted the opening of the curtain. The operation recorded one vote on the public counter. After the voting started the custodian and inspector noticed that the tension he had placed on the cord was too much and was causing the handle to be pulled out after it had been placed in a closed position by the voter. He observed that this resulted in the voter's again repeating the opening and closing process which registered extra votes on the public counter. He sought to remedy this condition by releasing tension on the cord and by adjustment. However, although he made every effort to control the situation, it was "almost impossible to do" and he and the other inspectors were aware during the election that the total on the public counters on both machines was exceeding the number of voters listed with the clerks. The custodian and inspector was absent from the polls only from 5:00 P. M. to 5:20 P. M. Affidavits of members of the Board of Education, other inspectors of election and various checkers, more than one of whom was present at all times during the voting, established that no unauthorized person entered the voting machines, that no one voted who had not been first listed and registered with the clerk and that no challenges were made to any voters during the election.

The Commissioner could have found that the excess of votes registered on the public counters was due to imper-

fection in the operation of the machines conceded and sworn to by the custodian and inspector in charge of the machines. He did find conversely that there was "no proof of any irregularity". Such a determination was well within a factually debatable field, into which Matter of Ross v. Wilson, 308 N. Y. 605 does not authorize intrusion.

The petitioners object also that school buses were used to transfer voters to the polls, at least until receipt of contrary advice from the Education Department, that form letters in favor of the proposition were prepared and mailed at the expense of the school district and that for a time after the opening of the polls an exhibit to influence the voters was displayed at the polling place. The Commissioner did not hold that these actions were in accordance with law. He did determine that they were not so significant to invalidate the election and to cause a reversal of the action of the meeting. There was a factual basis for his decision and his determination was not so unreasonable as to be arbitrary.

There are two petitioners in this proceeding. One of the petitioners is a dissident member of the Board of Education. This petitioner did not appeal to the Commissioner from the action of the meeting. He did not file an answer in which he admitted all of the allegations of the pleading of the appellant to the Commissioner, his copetitioner in this proceeding. In his answer he raised an additional issue, an expenditure by the Board of Education of a sum in excess of $400.00 in the preparation and distribution of a brochure. While it would seem that his remedy was to have appealed to the Commissioner pur-

suant to the Education Law, it was well within the discretion of the Commissioner here also to determine that the issuance of the brochure was insufficient to invalidate the election. The Commissioner did not find that the expenditure of the district's funds was proper; hence the issue of whether the brochure was a proper publicization of need for additional facilities need not be determined.

Finally the petitioners object that they were deprived of due process by the Commissioner's procedure on appeal and that oral testimony should have been taken with opportunity for cross examination. This objection may not be sustained (*Matter of Kieval v. Wilson*, 285 App. Div. 1203, appeal dismissed on the ground that no substantial constitutional question was involved ..... N. Y. .....).

The petition is dismissed on the merits.

Submit order on three days' notice.

Dated at Troy, New York, March 1, 1956.

APPENDIX C.

Memorandum Decision of Supreme Court, Special Term, Refusing Intervention by Board of Education, Ellicottville Central School District.

(Supreme Court, Albany County Special Term, December 9, 1955.)

(Justice Herbert D. Hamm, Presiding.)

Appearances:

Jeremiah J. Moriarty, Esq., Attorney for Applicant for intervention.

Charles A. Brind, Jr., Esq., (Dr. John P. Jehn, George B. Farrington, Esq., of counsel), Attorney for Respondent.

Shane & McCarthy, Esqs., (Edward M. Horey, Esq., of counsel), Attorneys for Petitioner, Donald O'Brien.

John W. Ellis, Esq., Attorney for Petitioner, William C. Murphy.

HAMM, J.,

The Board of Education seeks leave to intervene herein and to serve an answer. A brief on its behalf as *amicus curiae* has been accepted. As a reason for intervention the Board states: "That there are certain allegations in the Petition herein which pertain to the conduct of said Special Election by the Board of Education and matters of which the Commissioner of Education has no direct knowledge and cannot plead to, except from the record of the proceedings in the original Appeal herein."

In the proceeding before it the Court will review the issues and proof before the Commissioner on appeal. Moreover, the board is *functus officio* and has no special or beneficial interest beyond that of any eligible voter in the school district.

The motion is denied.

Submit order on three days' notice.

Dated at Troy, New York, March 1, 1956.

APPENDIX D.

Majority Opinion Court of Appeals per Fuld, J. Concurring Opinion Court of Appeals per Van Voorhis, J.

FULD, J. On this appeal, brought as of right on alleged constitutional grounds, the petitioners seek to annul a decision of the Commissioner of Education sustaining a special election in the Ellicottville Central School District at which the voters authorized the construction of a new high school and the issuance of bonds to finance it.

At the election, held on May 20, 1955, two voting machines were used to record the vote. The machines operate in this way: the voter enters a booth, pulls a handle closing a curtain about him and then selects and depresses a lever indicating his choice. To leave the machine and to record his vote, the voter opens the curtain by drawing back the handle. The act of manipulating the handle back and forth also activates a "public counter" which purports to show the total number of voters using the machine.

During the election, it was observed that, although the counters had been set beforehand at zero, they were running ahead of the voters and this fact was noted in the minutes of the meeting. The voting machines were over 25 years old and were equipped with a cord that had to be pulled taut by an attendant to control the operation of the handle that opened and closed the curtain. The custodian of the machines, in an affidavit, stated that the cords were slack and voters sometimes pulled the handle back and forth more than once, tallying twice on the public counter although their vote registered only once. It also appears from the several affidavits presented, that, in other elections, the number shown on the public counters frequently exceeded the number of registered voters.

In any event, there was no crowding or confusion at the polls. The voting was orderly and the number of voters such that nobody entered the voting booth without first registering his name on a "poll list." Although both sides of the controversy were represented by "checkers" and "inspectors" and although they were present throughout the election, not a single voter was challenged. After the election had been concluded and the polls closed, it appeared that 1,400 votes were actually cast, that there were 1,437 names on the poll list and that the public counters on the machines recorded a total of 1,461. Since, of the 1,400 votes cast, 704 were in favor of the proposed school and 696 against, the proposition was carried by 8 votes.

Displeased with the result, the petitioner, Donald O'Brien, appealed, pursuant to section 310 of the Education Law, to the Commissioner of Education for an order voiding and setting aside the election. The principal grounds asserted by the petitioner were, first, that the public counters on the machines indicated a total higher than the total number of names on the poll list and, second, that the School Board had improperly used public funds for propaganda in favor of the proposal.

One member of the seven-member School Board, petitioner William Murphy, filed an answer in which he admitted the allegations of the petition. The other six members of the board joined in an answer which, with affidavits submitted by the chairman and vice-chairman of the meeting, the custodian of voting machines, the clerk of the School District, three inspectors of election and seven checkers, denied that the "votes recorded on the public

counters" did or could "represent any illegal, unknown or unregistered voters."

The Commissioner of Education held a hearing at which, though no one was called to testify or give evidence, an opportunity was accorded for full oral argument, the submission and exchange of briefs and the filing of any and all affidavits, exhibits and other materials the parties desired. Following the oral argument and the submission of briefs and other papers, the Commissioner rendered his decision. Finding that "there is no proof of any irregularity" in the voting, and that "The other matters alleged * * * are not sufficient to cause a reversal of the action of the meeting", he dismissed the appeal. Some time later, this article 78 proceeding was brought to review that determination.

The Supreme Court upheld the decision of the Commissioner on the ground that it had "factual basis" and dismissed the petition. The Appellate Division affirmed; it was that Court's view that the affidavits offered in opposition to those of petitioners "demonstrated conclusively that there was no triable issue as to the claim that unauthorized persons had been allowed to vote." Declaring that, "Even if the excess number on the public counters remained an unexplained mystery, the most that could be inferred was that some voters had opened and closed the curtain more than once; there would still be no basis for an inference that they had voted more than once", the Appellate Division concluded with the statement that "It thus appears that even if the allegations of fact in the petition stood unexplained, there would be no ground to invalidate the election".

Whether or not that be correct, we are neither called upon nor empowered to decide, for the appeal is not properly before us. Section 588 (subd. 1, par. [a]) of the Civil Practice Act sanctions an appeal to this Court as of right only if there is "directly involved the construction of the [state or federal] constitution". Quite obviously, and we recently so held in a case very similar to the present one, the Commissioner of Education's resolution of a dispute on conflicting affidavits without an oral hearing neither directly involves the construction of the constitution nor poses a constitutional question of any kind. (See *Matter of Kuhn v. Commissioner of Educ.*, 2 N. Y. 2d 749; cf. 1 Benjamin, Administrative Adjudication in the State of New York, p. 183.) Reliance upon *Matter of Hecht v. Monaghan* (307 N. Y. 461) is thoroughly misplaced. The principle underlying that decision is not applicable to an administrative determination of the sort here involved. The *Hecht* case, we would but point out, dealt with the revocation of the petitioner's license to carry on his business, or occupation and necessarily affected his very right to make a living.

This is all that need be said. To embark on a discussion of the problems confronting the Commissioner of Education, of the duties imposed upon him and of the reviewability, generally, of his decisions, is entirely beside the point. All that we are now holding is that the appeal taken as of right does not lie.

The appeal should be dismissed.

Van Voorhis, J. (concurring). The Commissioner of Education resolves many administrative problems in the

management of the State department of which he is the executive head. In disposing of them he has a wide range of discretion, but he does not adjudicate the legal rights of contesting parties. In addition to these administrative duties, the Commissioner has been vested by law with original jurisdiction over other controversies that are judicial in nature, sometimes to be exercised concurrently by the Commissioner with Courts of law, and at other times to be exercised by him alone without recourse to the law Courts.* In either event, once jurisdiction has been assumed, the Commissioner finds the facts and applies the law in substitution for a Court, subject only to limited Court review (*Matter of Ross v. Wilson*, 308 N. Y. 605; *Matter of Levitch v. Board of Educ.*, 243 N. Y. 373). That is not an administrative but a quasi-judicial function, well understood in the field of administrative law. Although the exercise of that jurisdiction where the facts are clearly established, may appear similar in practice to use of administrative power, in essence it is different and its exercise is more carefully safeguarded by traditional methods of law and procedure since it involves the determination of justiciable controversies. Under our system of justice such controversies cannot be decided except according to procedure which satisfies the rudiments of due process of law, even though the procedure may be more flexible than would be applied in Court. A problem of public administration can be constitutionally decided like a similar problem in the management of private business, even dispensing with

* Whether or not the "exclusive" jurisdiction which section 2037 of the Education Law purports to confer on the Commissioner conflicts with section 1 of article VI of the State Constitution vesting in the Supreme Court general jurisdiction in law and equity, is not considered (cf. *Barone v. Ætna Life Ins. Co.*, 260 N. Y. 410; *Matter of Stilwell*, 139 N. Y. 337).

oral argument or the filing of affidavits if the officer sees fit and it is not required by statute. But when an issue arises that would be decided in Court as a judicial controversy except for a statute which transfers its determination to the Commissioner of Education, standards of a judicial nature have to be applied in order to fulfill the requirements of constitutional due process of law. Power to make rules of procedure has been conferred upon the Commissioner in general terms by section 311 of the Education Law, but such rules must be reasonable, and adapted to the matter in hand, and cannot violate the principles of due process (*Matter of Village of Bronxville v. Maltbie*, 284 N. Y. 206, 215). A rule such as subdivision d of rule 18 of the 1955 Rules of Practice of the Commissioner of Education prohibiting the taking of oral testimony and requiring all controversies to be heard on affidavits and exhibits, may be valid for the disposal of administrative questions and even quasi-judicial matters where there is no triable issue of fact (e.g., *Matter of Kuhn v. Commissioner of Educ.*, 1 A. D. 2d 553, appeal dismissed 2 N. Y. 2d 749, where it was disputed that certain ballots had been correctly marked, and the disputed ballots were in evidence before the Commissioner). In such instances where there is no triable issue of fact, there is no greater constitutional need for the taking of evidence in a quasi-judicial hearing than there would be in Court on a motion for summary judgment under rule 113 of the Rules of Civil Practice or for the various kinds of relief for which motions may be granted on affidavits under rule 108. But the taking of testimony cannot be prohibited under the rule-making power, nor even by statute, in a judicial or quasi-judicial proceed-

ing where the facts are in dispute or are not clearly established without violating the due process clauses of the State and Federal Constitutions. Justice BRANDEIS once wrote that "in the development of our liberty insistence upon procedural regularity has been a large factor" (*Burdeau v. McDowell*, 256 U. S. 465, 477). Justice FRANKFURTER has added: "It is noteworthy that procedural safeguards constitute the major portion of our Bill of Rights" (*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 164).

There has been an endeavor to blend administrative and judicial functions in the Department of Education. Administratively the Commissioner is charged with executing the policies of his department through the public school system of the State. By sections 2037 and 310 of the Education Law, he is also given judicial power in the field over which he is administrator. He thus frequently sits as judge in his own case as administrator. That does not mean, however, that the Commissioner is universally above the law except as he chooses to apply or interpret it: Instead of freeing him from the requirements of due process in the exercise of quasi-judicial power, this concentration of power and responsibility renders vitally necessary observance by him of the fundamental law in proceedings of this character. Due process in the decision of justiciable controversies require a hearing, including opportunity to the parties to examine and cross-examine witnesses if material facts or inferences of fact are conflicting or uncertain (*Matter of Hecht v. Monaghan*, 307 N. Y. 461; *Matter of New York Edison Co. v. Malthie*, 271 N. Y. 103; *Matter of Guernsey Breeders Co-op v. Nones*, 284 N. Y. 197;

Matter of Rochester Tr. Corp. v. Public Service Comm., 271 App. Div. 406).

This controversy has arisen from the circumstance that the Legislature has committed the improvement of sites in school districts, and the issuance of bonds and the levying of taxes to pay for them, to majority vote of the qualified voters at school district meetings (Education Law §§ 416, 2021). Qualified voters consist mainly of taxpayers and parents of children of school age in the district (Education Law, § 2012). The favorable vote of a majority is a jurisdictional requisite to the construction and financing of these improvements and to payment therefor by taxation (*Matter of Floyd-Jones v. Town Board*, 249 N. Y. 398, 405). The Legislature could have directed the erection of this schoolhouse and the levying of taxes without local consent, but, local consent having been made a condition precedent by statute to the erection of the building and the charging of taxes to pay for it against the real property in the district, the taxpayers have a right to insist that the condition precedent imposed by the Legislature shall be met. They are entitled to a determination in some forum under due process of law that this proposition was in fact passed at a district meeting duly called and held.

Even though the Constitution does not require previous consent of voters to the erection of this schoolhouse, these taxpayers had the right to insist that the fact be established by constitutional means that the proposition was passed. They could not be bound by the mere fiat of the Commissioner of Education that the proposition passed in the absence of adequate proof that it was passed. Ordinarily the

return of the inspectors of election would be sufficient proof. Here, for reasons hereafter stated it was not, and the return left the fact in uncertainty and dispute. The Commissioner is authorized to decide the fact as a quasi-judicial officer, as it might have been decided in Court, but that signifies that he must decide it in accordance with the constitutional requirements of due process.

In the instant case taxpayers seek to review a determination by the Commissioner of Education which upheld a central school district special election at which a proposition to build a junior-senior high school was reported as carried by 8 votes. The "public counters" on the voting machines indicated that these machines had been operated 24 times more than the total number of persons who had been admitted to vote by the inspectors of election. This discrepancy was equal to 3 times the number of votes which would have been necessary to have changed the result. In a political election this would be regarded as a serious irregularity, impugning the accuracy of the announced result to such a degree as to cast the burden of sustaining the election upon the victors (*People ex rel. Judson v. Thacher*, 55 N. Y. 525). Two previous school elections were vacated and new elections ordered by former Commissioners of Education on account of somewhat similar irregularities (*Matter of District 13, Town of Huntington*, 58 N. Y. St. Dept. Rep. 461; *Matter of District 6, Town of Babylon*, 64 N. Y. St. Dept. Rep. 113). In the present case the Commissioner stated in an opinion that he does not attempt "to solve the mystery of the differences in the various totals", but sustained the election. Affidavits were submitted to him in behalf of the local Board

of Education purporting to show that some voters—without stating how many—had closed and opened the curtain on the voting machine several times while voting once. It was inferred that this was the cause of the discrepancy and that it happened 24 times. Appellant taxpayers contend that this is mere speculation. They also contend—and this is where the constitutional question would enter on the basis of which they have appealed as of right—that in seeking redress before the Commissioner of Education they were entitled to examine and cross-examine the witnesses, and to elicit from the inspectors of election and others who made affidavits for the Board of Education that they could not have seen the voters through the curtains of the voting machines, who are supposed to have become nervous and to have closed and opened the curtains several times when they should have done so only once. Such a person would have voted several times, intentionally or unintentionally, if he or she pulled down the "yes" or "no" lever on the voting machine each time before opening the curtain. Appellants contend that they had a right, among other matters, to cross-examine these witnesses concerning how they knew that the voting lever was pulled down only once when the curtain handle was jerked back and forth several times. They also contend that only by testimony could it have been elicited what were the facts underlying the insoluble "mystery" with which the Commissioner found himself confronted on the basis of the affidavits submitted to him.

The Appellate Division has held notwithstanding that this would be a justiciable question, to be decided in Court, if it arose in a political election, that the nature of the

issue is changed for the reason that it is decided by the Commissioner of Education." The accepted rule is that the function classifies itself as administrative or quasi-judicial according to its nature and does not become the one or the other depending upon by what official it is to be performed. Only by what seems to me to be this strained reasoning was it thought possible to escape the principle thus enunciated in *Matter of Hecht v. Monaghan* (*supra*, p. 470): "The hearing held by an administrative tribunal acting in a judicial or quasi-judicial capacity may be more or less informal. Technical legal rules of evidence and procedure may be disregarded. Nevertheless, no essential element of a fair trial can be dispensed with unless waived. That means, among other things, that the party whose rights are being determined must be fully apprised of the claims of the opposing party and of the evidence to be considered, *and must be given the opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal.* [citing cases]." (Italics supplied.) Referring to the notice attached to the summons before the police commissioner in the *Hecht* case that "YOU MAY BRING WITNESSES WITH YOU", the opinion by Judge, now Chief Judge COXWAY, states (p. 469): "Manifestly, then, the respondent recognized an obligation imposed upon it by those fundamental principles of basic justice and fair play which underlie our entire system of jurisprudence."

I do not understand by what reasoning the right to call and to cross-examine witnesses is a fundamental principle of basic justice and fair play when applied to a hearing before a police commissioner but not when applied to a hearing before the Commissioner of Education. The Court

entertained jurisdiction in *Matter of Hecht v. Monaghan* on an appeal as of right on constitutional grounds, it being held that a hack driver's license had been revoked without due process. A hack driver's license was regarded as a property right conferred on Hecht under the Administrative Code of the City of New York. The Appellate Division appears to have held here that taxpayers in a school district have no property right to insist that a fair election shall be conducted as provided by the Education Law, before their properties can be charged with the $1,260,000 estimated cost of this new improvement. Let us assume that it would be good for the people in the district to have a new schoolhouse. Nevertheless the law is not in the Commissioner's breast. His will does not have the force of law. He can only adjudicate the rights and liabilities of these parties according to law, and as the trier of the facts concerning what did happen at this election. He could try the facts in no way except by due process of law. "The issue before this Court", as was said in the *Hecht* case, "is whether the hearing accorded petitioner * * * met the minimal constitutional requirements." It did not meet the minimal constitutional requirements here.

It is enlightening that in section 313 of the Education Law (added by L. 1948, ch. 753; amd. by L. 1951, ch. 208, and L. 1953, ch. 356) discrimination in the admission of applicants to educational institutions is forbidden on account of race, religion or national origin. In that context it is provided that the Commissioner and the Board of Regents shall have power to subpoena witnesses, compel their attendance, take testimony under oath, and that the respondent shall have the right to "*present evidence and*

examine and cross-examine witnesses." This section continues by assigning the consequences "If, *upon all the evidence*, the regents shall determine", etc. (Italics supplied). No lack of due process is there. This statute, only two sections removed from the section on which the Commissioner relies as having given to him rule-making power to dispense with the taking of testimony in all cases, shows that the Legislature was aware of what is necessary and constitutional in order to get at the real facts of a situation. It shows that the Legislature realized the force of Professor Wigmore's famous utterance that cross-examination is the greatest engine for the discovery of truth that was ever invented. If these effective constitutional procedures were intended to be applied in ascertaining whether a negro, for example, has been discriminated against in admission to a school, are taxpayers so unimportant that they are to be treated as having no stake in a district election? The nearer the Commissioner comes to possessing the absolute powers for which his counsel contends, the more scrupulously is he obliged to secure these constitutional rights to taxpayers and all interested parties.

The ruling by the Appellate Division is tantamount to holding that the Legislature may preclude, and has in this instance precluded, all redress in the Courts to adjudicate upon the facts with respect to the conduct of school district elections, and has placed that judicial function nowhere else except as the Commissioner may deal with such controversies by administrative methods, in an administrative capacity and without judicial or quasi-judicial safeguards. If a function which would otherwise be exercised in this case by a Court in a judicial capacity, is

transferred by statute for determination to the Commissioner of Education, there is no basis for concluding that its nature is thereby changed so as to make it an administrative function instead of one which is judicial. The Commissioner cannot be vested with the power and duty of a judge without at the same time being obliged to act judicially. It is common practice for the Legislature to assign judicial functions to administrative bodies or officers, but that does not make the function administrative in nature. Courts have been careful to distinguish between functions which are judicial, although performed by administrators, from those which are merely administrative and therefore subject to being executed without a hearing or the taking of testimony or other attributes of the administration of justice under law. In *Joint Anti-Fascist Refugee Committee v. McGrath* (*supra*, p. 168), it is said in the opinion of Justice FRANKFURTER: "Congress has often entrusted, as it may, protection of interests which it has created to administrative agencies rather than to the Courts. But rarely has it authorized such agencies to act without those essential safeguards for fair judgment which in the course of centuries have come to be associated with due process [citing cases]."

In *Morgan v. United States* (304 U. S. 1, 18), it was said in an opinion by Chief Justice HUGHES: "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one." It was further said in that opinion (pp. 14-15): "The vast expansion of this field of adminis-

trative regulation in response to the pressure of social needs is made possible under our system of adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing as been described as an 'inexorable safeguard.' [citing cases]." It would be easy to multiply decisions and statements of this character by citations from our State courts. In *Kade v. Greenhut Co.* (193 App. Div. 862, 868), for example, it was stated in a case involving the State Industrial Commission: "This would seem to impose the duty upon this Court, in ordinary matters of appeal, of determining whether there was evidence 'supporting or tending to sustain a finding of fact,' and the United States Supreme Court, in *Ohio Valley Co. v. Ben Avon Borough* (253 U. S. 287), holds squarely that it is necessary to due process of law that 'the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts.'"

In *Matter of Peters v. New York City Housing Auth.* (307 N. Y. 519), an order of the Appellate Division was reversed upholding the Gwinn Amendment (66 U. S. Stat. 403) forbidding the occupancy of housing units constructed with Federal aid "by a person who is a member of an or-

ganization designated as subversive by the Attorney General". The question of constitutionality was reserved pending remission to Special Term to ascertain whether it was necessarily involved, but it is noteworthy that the Appellate Division upheld the constitutionality only for the reason that organizations on the Attorney General's list "demanding a hearing are entitled to have one before the Attorney General of the United States, at which they may be represented by counsel, introduce evidence and examine witnesses; and they may obtain a transcript of the proceedings (18 Federal Register 2619)" (283 App. Div. 801, 802). The Justice who decided the proceeding at the Kings County Special Term considered that no such hearing was provided, and wrote a scholarly and informative opinion on the subject which is relevant here (9 Misc. 2d 942). Taxpayers are entitled to due process of law quite as much as though they were charged with being subversives.

Pointing out that due process is not confined in its operation to courts of law, this Court said in *Stuart v. Palmer* (74 N. Y. 183, 190): "This provision is the most important guaranty of personal rights to be found in the Federal or State Constitution. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall be deprived of his life, liberty, or property. This the Legislature cannot do nor authorize to be done."

In *Joint Anti-Fascist Refugee Committee v. McGrath* (*supra*, pp. 162-163), it was further said by Justice FRANKFURTER: "Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded

of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess."

It is incorrect to state as the Appellate Division has done that the Legislature has here authorized the Commissioner of Education to decide this issue without holding a hearing. On the contrary subdivision 12 of section 2215 of the Education Law provides that a district superintendent of schools shall have the power and duty "To take and report to the commissioner of education under the direction of such commissioner testimony in a case on appeal. In such a case or in any matter or proceeding to be heard or determined by the district superintendent, he may issue a subpoena to compel the attendance of the witness." The Legislature thus supplied a procedure for taking testimony, involving the examination and cross-examination of witnesses, where due process requires it. The discretion given to the Commissioner in ordering such proceedings is not absolute. The legislative intent was that the Commissioner would direct such procedure in quasi-judicial hearings where it is necessary in order to get at the facts. The 1947 printed comments of the Commissioner of Education state concerning subdivision 12 of section 2215: "It is not the design of this section to supersede the present mode established by regulation of presenting testimony upon application in the form of written affidavits, but to enable the Commissioner of Education to obtain additional light, where the written evidence is conflicting, ambiguous, or otherwise unsatisfactory, by the oral examination of witnesses before a superintendent." (Handbook, 1947 Rules of Commissioner of Education, pp. 7, 9.)

It would be difficult to express more exactly the shortcomings of the affidavits that were before the Commissioner when he decided this proceeding. They were "conflicting, ambiguous, or otherwise unsatisfactory." This comment does not appear in the 1955 Rules of the Commissioner, which state categorically (rule 18, subd. d): "Testimony is not taken and all necessary factual matters should be presented in affidavit form or in the form of exhibits." This rule does not follow the statute; it takes no account of section 313 in cases of discrimination which are to be tried on testimony before the Board of Regents; it contains no reference to subdivision 12 of section 2215 just mentioned, where the Legislature has supplied a procedure exactly fitted to this situation. Moreover, this rule purports to have been adopted only pursuant to general power conferred by section 311 to adopt rules regulating practice. Such rules must be reasonable and adapted to the matter at hand, as well as in accord with statute and fundamental law (*Matter of Elite Dairy Prods. v. Ten Eyck*, 271 N. Y. 488; *Matter of New York Water Service Corp. v. Water Power & Control Comm.*, 283 N. Y. 23; *Matter of Village of Bronxville v. Maltbie*, 284 N. Y. 206, 215, *supra*). Even where a statute is specific with respect to procedure which administrative tribunals may adopt (which § 311 is not) or the practice is provided by the statute itself, due process of law must be observed (*Matter of Central Hanover Bank & Trust Co.*, 274 App. Div. 772, appeal dismissed 298 N. Y. 902; 299 N. Y. 697, revd. 339 U. S. 306).

If testimony had here been taken under order of the Commissioner by a district superintendent of schools under subdivision 12 of section 2215, opportunity would have

been allowed for examination and cross-examination of witnesses, the Commissioner's time would not have been consumed in hearing testimony, but it would have been his duty to render his decision after reading the evidence taken by the superintendent, and on the basis of such evidence (*Matter of Kilgus v. Board of Estimate*, 308 N. Y. 620). That is familiar practice in the field of administrative law where testimony is taken by a trial examiner. The Legislature appears to have contemplated that a district superintendent would be the trial examiner, but the rule of the Commissioner takes no account of that.

It has been well said by Robert M. Benjamin in his report to Governor Lehman on Administrative Adjudication in New York State (Vol. 1, p. 86): "The presentation of evidence and argument by the parties and the testing of contrary evidence and argument have advantage beyond the advantage of satisfying the legitimate feelings of the parties. Procedure of this kind will go far toward assuring informed and correct administrative action, to the benefit alike of the parties and of the administrator. Neither judicial review nor other judicial remedy (*e.g.* an action for damages) can offer a substitute, wholly satisfactory either to the parties or to the administrator, for an administrative procedure calculated to reach the correct result in the first instance."

Here the Commissioner of Education finds the facts; if there be substantial evidence to go upon, his findings of fact are final. This is true regardless of what power of review the courts may have over his action in view of section 310 of the Education Law (*Matter of Ross v. Wilson*, 308 N. Y. 605, *supra*), and regardless of whether his juris-

diction over district elections under section 2037 excludes that of the Supreme Court (cf. *Matter of Malloy*, 278 N. Y. 429). Unless the parties are accorded a hearing for the determination of the facts, in accordance with the commonly accepted meaning of that term, it is impossible to be assured that a correct result is reached. This 1955 rule 18 (subd. d) is valid and applicable in purely administrative hearings and in quasi-judicial proceedings where there is not a triable issue of fact, but where there is a triable issue of fact in a quasi-judicial controversy resort must be had to subdivision 12 of section 2215 of the Education Law. That is the legislative procedure provided to protect the constitutionality in such situations.

The problem in this case seems to arise from fear on the part of the Commissioner or his counsel that if witnesses are to be called where it is appropriate and necessary, it would be necessary to call witnesses in every administrative or quasi-judicial matter arising in the administration of the affairs of the Department of Education. Nothing could be farther from the case. Such a view overlooks the flexibility of adaptation of due process, and manifests an unwillingness to adjust procedures to the nature and necessities of the case. To say that if evidence is taken in one situation it must be taken in every situation would, for example, nullify court procedure by summary judgment, or the granting of relief on motion on affidavits under rule 108 of the Rules of Civil Practice. The *Kuhn* case (1 A. D. 2d 533, 2 N. Y. 2d 749, *supra*) is an example of where it is not necessary to take evidence in a quasi-judicial hearing. There the defects in the district election were claimed to consist in the marking of the ballots. The ballots were in

evidence before the Commissioner. The oral evidence could not have added to or detracted from the evidentiary basis for the decision. The present case is different. Where reviewability in Court depends upon the Commissioner's determination being classified as "purely arbitrary" (*Matter of Ross v. Wilson*, 308 N. Y. 605, *supra*), a ruling must be so classified which denies to taxpayers their constitutional rights in the presentation and testing of evidence, in the process of determining whether the jurisdictional facts exist on the basis of which their properties are to be charged with the cost of this improvement. These taxpayers did not have a constitutional right to a district meeting to approve the project. But the Legislature required a district meeting for that purpose, and the taxpayers had a constitutional right to fair play in the procedure by which it was decided whether the proposition was carried at the meeting. If the Commissioner's rule 18 (subd. d) stands in the way of that by prohibiting the testimony of witnesses, then in such cases the rule is void. The appealability of the Appellate Division's order is established, in my view, upon the same basis as in *Matter of Hecht v. Monaghan* (*supra*) provided only that appellants have not waived the right to insist upon their constitutional right to the examination of witnesses.

The brief for appellant O'Brien states that "From the commencement of this action before the Commissioner of Education, and continuously thereafter, appellant has excepted to the absence of an administrative hearing. The asserted right to such a hearing has been premised upon the decision of this Court in *Matter of Hecht v. Monaghan*". I have not found in the record before this Court

anything from which it appears in writing that these appellants did object before the Commissioner, to being foreclosed of the opportunity to cross-examine the persons who made the affidavits submitted by the Board of Education, or that appellants demanded the right to examine witnesses of their own. Nowhere does it appear that they asked the Commissioner to refer the taking of testimony to a district superintendent of schools under subdivision 12 of section 2215 of the Education Law. It may be that they did urge the Commissioner orally to do these things, but unfortunately for them the record does not show it. Possibly they were deterred from making such a demand by the Commissioner's rule 18 (subd. d), believing that if they did it would be refused. That is not a substitute for making the demand. Appellants' position in this Court appears to be based upon the invalidity of that rule. In my view the rule is not void in its entirety, but only insofar as it would apply to a quasi-judicial proceeding before the Commissioner where the facts or inferences of facts are incompletely established or are conflicting. In by no means every instance, even in quasi-judicial proceedings, is the Commissioner obliged to take testimony. Therefore it seems to me that mere reliance on the invalidity of the rule is not enough. It was incumbent on appellants to request or demand of the Commissioner that the testimony of witnesses be taken. If they desired to cross-examine the witnesses for the Board of Education, appellants should have said so to the Commissioner and insisted upon their right to that procedure, and if they did that they should have seen to it that the circumstance of their demand and the Commissioner's refusal became part of the record in the Court proceeding. Even the petition in this article 78 pro-

ceeding does not allege expressly that such a demand was made upon the Commissioner. The order dismissing the petition was entered on the pleadings. It does not appear that appellants applied at Special Term to have testimony taken in this article 78 proceeding to show that they did demand of the Commissioner that he allow them to examine or to cross examine witnesses when they were before him. In view of the absence from the record of anything to show that the question was raised, I concur for dismissal of the appeal. The Appellate Division held that appellants had no constitutional right to a hearing, in the traditional sense, and in this I think that they erred.

This case touches one of the most fundamental legal questions of the day. It is not confined to the Education Department but relates to whether and to what extent our traditional liberties are carried forward into the practice of administrative tribunals, which are so large a part of today and tomorrow. What has been said in this opinion relates to the Commissioner of Education in his official capacity, and is in no manner directed personally at the distinguished gentleman who occupies that office.

For the reasons stated, I concur in the dismissal of this appeal.

Chief Judge Conway and Judges Desmond, Dye, Froessel and Burke concur with Judge Fuld; Judge Van Voorhis concurring in a separate opinion.

Appeal dismissed, without costs, upon the ground that no constitutional question is directly involved.

APPENDIX E.

Order of Court of Appeals Dismissing Appeal.

COURT OF APPEALS

State of New York, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 27th day of March in the year of our Lord one thousand nine hundred and fifty-eight, before the Judges of said Court.

Witness,

The Hon. Albert Conway,

Chief Judge, Presiding.

Raymond J. Cannon,

Clerk.

Remittitur March 27, 1958.

No. 297

In the Matter of the Application
of
DONALD O'BRIEN and WILLIAM C. MURPHY,
Appellants,
under Article 78 of the Civil Practice Act, to Review the Decision and Order of the COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,
Respondent,
holding valid a Special Election, held the 20th day of May, 1955, in and for the Ellicottville Central School District, &c.

BE IT REMEMBERED, that on the 31st day of October, in the year of our Lord one thousand nine hundred

and fifty-seven Donald O'Brien and William C. Murphy, the appellants in the cause, came here unto the Court of Appeals, by Shane & McCarthy, and John W. Ellis, their respective attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Commissioner of Education of the State of New York, the respondent in said cause, afterwards appeared in said Court of Appeals by Charles A. Brind, Jr., his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeal having heard this cause argued by Mr. Edward M. Horey, of counsel for the appellant O'Brien, and by Mr. John W. Ellis, of counsel for the appellant, Murphy, and by Mr. Charles A. Brind, Jr. of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the appeal herein be and the same hereby is dismissed, without costs, upon the ground that no constitutional question is directly involved.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said appeal be dismissed, without costs, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of

New York before the Justices thereof, according to the firm of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, March 27, 1958.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

(SEAL)

State of New York,
County of Albany, Clerk's Office. } ss.:

No. 11470

(SEAL)

I, DONALD L. LYNCH, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, DO HEREBY CERTIFY that I have compared the annexed copy order with the original thereof filed in this office on the 25 day of April and that the same is a correct transcript therefrom, and the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal, this 20 day of March, 1959.

DONALD L. LYNCH,
Clerk.

FILE COPY

FILED
OCT 19 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 419

In the Matter
of
DONALD O'BRIEN and WILLIAM C. MURPHY,
Appellants,
vs.
THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,
Respondent.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

CHARLES A. BRIND,
Attorney for Respondent,
State Education Building,
Albany, New York.

BRIGHAM PRESS, INC.
ALBANY, N. Y.

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IN THE

Supreme Court of the United States

In the Matter
of
DONALD O'BRIEN and WILLIAM C. MURPHY,
Appellants.

vs.

THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,
Respondent.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL.

The Respondent, the Commissioner of Education of the State of New York, does hereby move to dismiss the appeal herein.

The ground for Respondent's motion to dismiss the appeal is as follows:

I. The appeal is not timely.

II. The appeal does not present a substantial Federal question.

The following sections of the Education Law of New York State are pertinent to this action:

"§ 310. Appeals or petitions to commissioner of education and other proceedings. Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever. Such appeal or petition may be made in consequence of any action:

1. By any school district meeting.

2. By any district superintendent and other officers, in forming or altering, or refusing to form or alter, any school district, or in refusing to apportion any school moneys to any such district or part of a district.

3. By a county treasurer or other distributing agent in refusing to pay any such moneys to any such district.

4. By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school or on any other matter upon which they may or do officially act.

5. By any trustees of any school library concerning such library, or the books therein, or the use of such books.

6. By any district meeting in relation to the library or any other matter pertaining to the affairs of the district.

7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools."

"§ 311. Powers of commissioner upon appeals or petitions, *et cetera*. The commissioner, in reference to such appeals, petitions or proceedings, shall have power:

1. To regulate the practice therein.

2. To determine whether an appeal shall stay proceedings, and prescribe conditions upon which it shall or shall not so operate.

3. To decline to entertain or to dismiss an appeal, when it shall appear that the appellant has no interest in the matter appealed from, and that the matter is not a matter of public concern, and that the person injuriously affected by the act or decision appealed from is incompetent to appeal.

4. To make all orders, by directing the levying of taxes or otherwise, which may, in his judgment, be proper or necessary to give effect to his decision."

"§ 2037. Determination of meeting or election disputes. All disputes concerning the validity of any district meeting or election or of any of the acts of the officers of such meeting or election shall be referred to the commissioner of education for determination and his decisions in the matter shall be final and not subject to review. The commissioner may in his discretion order a new meeting or election."

Statement of Facts

This action had its inception in an election which was held at a special meeting of the voters of Central School District No. 1 of the Towns of Ellicottville, Great Valley, Mansfield, Humphrey, East Otto and Franklinville, Cattaraugus County, New York, on May 20, 1955, at which a proposition authorizing the erection of a junior-senior high school building at a total estimated cost of $1,260,000 and the issuance of bonds to finance it was approved by a vote of 704 in favor to 696 against. The total vote was 1400.

Two voting machines were used in the election. The public counters on the machines registered a total of 1461. There were 1437 names of eligible voters on the poll list.

Donald O'Brien, a resident of the school district, appealed to the Respondent Commissioner of Education to

set aside the election on the ground of irregularity between the 1461 figure on the public counters and the 1400 votes cast.

The Board of Education of the school district appeared and filed its answer by its attorney, except that one member of the Board, who is Appellant William C. Murphy herein, filed a separate answer, retaining his own counsel.

The Commissioner of Education on November 16, 1955 dismissed the appeal.

"There is no proof of fraud presented—indeed there is no claim that fraud existed," he said in his decision. (Decision No. 6141.)

The Commissioner could find no evidence that any voter had cast more than one vote. He noted that "the explanation of the respondent (school district) that the handle of the voting machine was opened and closed twice by some people, thus making the machine record a double instead of a single 'count' is as plausible as any speculation."

"Nevertheless there is no proof of any irregularity," he continued.

The aforesaid Donald O'Brien and William C. Murphy thereupon sought to review and annul the Respondent Commissioner's decision by a proceeding under Article 78 of the New York Civil Practice Act.

Justice Herbert D. Hamm, presiding at a Special Term of the New York Supreme Court held in the County of Albany, on March 1, 1956 dismissed the petition on the merits. He stated that the petitioners' objection that they were deprived of due process by the Commissioner's procedure on appeal "may not be sustained."

Donald O'Brien and William C. Murphy took an appeal to the Appellate Division of the New York Supreme Court, Third Judicial Department, from Justice Hamm's Order dismissing the petition in the Article 78 proceeding.

The Appellate Division, in a decision dated March 21, 1957 and in an order entered March 27, 1957, unanimously affirmed the Order of the Special Term dismissing the petition.

In an Opinion written by Associate Justice Philip Halpern, the Court concluded as follows:

"Even if all the allegations in the petition as to this matter were accepted as true, the only inference that could be drawn would be that the handle of the machine had been moved improperly, not that improper votes had been cast. None of the proof offered by the petitioners, even if accepted at its full value, could demonstrate that the Commissioner's decision upholding the election had no rational basis or that it was arbitrary or capricious. Therefore, the Special Term correctly disposed of the proceeding summarily, without taking proof (Civil Practice Act, § 1295)."

Donald O'Brien and William C. Murphy thereupon appealed as of right to the Court of Appeals of New York State from the Order of the aforesaid Appellate Division.

The Court of Appeals dismissed the appeal on the ground that no constitutional question is directly involved on March 27, 1958. The Order and Judgment of the Court of Appeals was made the Order and Judgment of the Supreme Court of New York State at a Special Term held in and for the County of Albany on April 25, 1958.

(It is this final Judgment and Order from which Appellant William C. Murphy is appealing to this Court pur-

suant to the provisions of Title 28, United States Code, § 1257 (2).)

After entry of the aforesaid Judgment and Order on April 25, 1958, Appellant William C. Murphy moved in the Appellate Division of the New York Supreme Court, Third Judicial Department, for permission to appeal to the New York Court of Appeals. The motion was unanimously denied May 23, 1958, and an Order entered to that effect July 23, 1958.

A similar motion for permission to appeal to the Court of Appeals was made by Appellant William C. Murphy to the said Court of Appeals, which said motion was denied October 16, 1958, and an Order entered to that effect October 31, 1958.

Thereafter on or about the second day of February 1959, Appellant William C. Murphy served on the Respondent Commissioner of Education and filed with the Clerk of the Court possessed of the record a Notice of Appeal to the Supreme Court of the United States from the aforesaid Judgment and Order of the Court of Appeals of the State of New York entered in the Supreme Court, County of Albany, New York, on the 25th day of April 1958, upon the remittitur of the Court of Appeals of the State of New York.

A cross-designation of additional portions of the record was served and filed by the Respondent Commissioner of Education on the 20th day of February 1959, and the aforesaid Clerk of the Court began preparing the transcript of the record.

Thereafter Appellant William C. Murphy determined no appeal was pending in this Court and made a motion on April 1, 1959 in the Court of Appeals of the State of

New York for an order granting a rehearing and reargument of his previous appeal to said Court. This motion was denied in an order by the Court of Appeals of the State of New York dated the 14th day of May 1959, and entered and filed in the office of the Clerk of the County of Albany, New York, on the 22nd day of May 1959.

As was indicated above, the Appellant William C. Murphy has here appealed from a final Judgment and Order of the Court of Appeals of the State of New York dismissing the appeal upon the ground that no constitutional question was directly involved, decided on March 27, 1958. Said order was entered by the Clerk of the New York Supreme Court, Albany County, New York, on April 25, 1958, upon the remittitur of the Court of Appeals of the State of New York.

ARGUMENT

I.

The appeal is not timely.

The appeal was not commenced within the time prescribed by statute. The Appellant has 90 days from the date of the final order and judgment of the highest court of the State of New York in which to commence an appeal to the United States Supreme Court, 28 U. S. C. 2101 (c). The order and judgment of the Court of Appeals appealed from herein was made by the Court of Appeals on March 27, 1958. Thus, the time for the Appellant to appeal to this Court commenced on March 27, 1958. The notice of appeal herein was received by the Respondent on July 28, 1959, which was more than 90 days from March 27, 1958.

The Appellant contends that the 90-day period for filing a notice of appeal to this Court was tolled by his motion

dated April 1, 1959, in the Court of Appeals for reargument of the appeal which was determined originally by the Court of Appeals on March 27, 1958. The said motion for reargument was denied on May 14, 1959.

The time to appeal to the United States Supreme Court commences to run in the case of an appeal from a final order of the Court of Appeals of the State of New York on the date of the final order and judgment of the Court of Appeals which is sought to be appealed from. (*Department of Banking* v. *Pink*, 317 U. S. 264.)

In the State of New York there is no period prescribed by statute or rule for the filing of a motion in the Court of Appeals for reargument of a matter previously determined by the Court of Appeals. Such motion can be made at any time after the Court of Appeals makes its final order and judgment. (*Franklin Bank Note Co.* v. *Mackey*, 158 N. Y. 683; Rule XX of the Rules of Practice of the Court of Appeals of the State of New York; Cohen and Karger, on Powers of the New York Court of Appeals, § 186; Carmody-Wait Cyclopedia of New York Practice, Vol. 9, Page 405; 84 A. L. R. 597, note VII.)

It has been held that a timely motion for reargument or rehearing will toll the running of the time to appeal to the United States Supreme Court. (*Department of Banking* v. *Pink*, *supra*; *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144.) However, the filing of an untimely petition for a rehearing or reargument which is not entertained or considered on the merits does not operate to extend the time for appeal. (*Bowman* v. *Loperena*, 311 U. S. 262; *Pfister* v. *Northern Illinois Finance Corp.*, *supra*.) It has also been held that the filing of an untimely petition for rehearing or reargument if denied does not

operate to extend the time to appeal. (*Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131, 137.)

Since there is no statutory period for filing a motion for reargument in the Court of Appeals in the State of New York, there actually is no such thing as a timely or untimely petition for rehearing. It would seem, therefore, that a motion for reargument in the Court of Appeals, if not granted by the Court of Appeals, should not be deemed to extend the time to appeal to this Court. The motion to reargue in this case was made 1 year and 5 days after the Court of Appeals made its final order herein sought to be appealed from.

It would appear that the reasoning of this Court in *Federal Trade Commission* v. *Minneapolis Honeywell Co.*, 344 U. S. 206, together with the holding of this Court in *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, *supra*, would be governing. There must be an end to litigation, and there must be definite time limits upon which litigants may depend. If a person wishes to appeal a final order of the Court of Appeals to this Court, such person should pursue his remedy expeditiously and file the notice of appeal within 90 days of the final order. If such person does not do so, but instead files a motion for reargument, the words of this Court are applicable: "A defeated party who applies for a rehearing and does not appeal from the judgment or decree within the time limited for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the court refuse to entertain it, does not extend the time for appeal."

It is respectfully submitted that in New York where a person is unsuccessful in a matter finally determined by the Court of Appeals such person should, if he wishes to appeal to this Court, file his appeal within 90 days of such

final order, or in the alternate file an application for reargument in the Court of Appeals, knowing full well that if the motion for reargument is denied that the filing of such motion for reargument does not extend the time for taking an appeal to this Court.

In any event, the motion to reargue made in the Court of Appeals was made by the Appellant by filing a notice of motion dated April 1, 1959, which was 1 year and 5 days after the date of the original order and judgment of the Court of Appeals. A notice of motion for reargument filed after the time to appeal to the Supreme Court of the United States has expired cannot revive the time to appeal. (*Conboy v. First National Bank of Jersey City*, 203 U. S. 141.)

If the Appellant is successful in his contention that this appeal is timely it will lead to a situation where an order and judgment of the Court of Appeals can always be appealed to this Court, even 100 years later, by merely filing with the Court of Appeals an application for reargument and upon the denial of such application or dismissal of the motion the person would have 90 days thereafter in which to appeal to this Court. This case illustrates the above. Here the voters in 1955 authorized the erection of a building to house school children, and the matter is still held up because of this litigation. The Constitution of the State of New York requires the Legislature provide for a continuously operating system of public schools and the interest of our school children requires that there be a known termination date of the litigation here in question. Delay serves no one; harms our youth. All parties are entitled to know and rely upon the final determination of the courts without there being a perpetual question of the right to appeal this matter.

II

The appeal herein does not present a substantial Federal question.

Appellant fails to hold up to the Court any statute of the State of New York which is repugnant to the Constitution, treaties or laws of the United States; and, there is a notable lack of evidence in the record that Appellant William C. Murphy was deprived of any "life, liberty, or property, without due process of law" or was denied "equal protection of the laws." (Article XIV, Section 1, of the Amendments to the Constitution of the United States.)

The appeal to the Commissioner of Education of the State of New York was taken pursuant to the provisions of Section 310 of the New York State Education Law, and the decision of the Commissioner was rendered pursuant to that section and Section 2037.

In the appeal to the Commissioner, the petitioners were afforded complete procedural due process of law and full protection of the laws of the State of New York. An examination of the record herein will demonstrate that the entire proceeding before the Commissioner of Education was conducted in compliance with rules adopted by the Commissioner pursuant to the express provisions of statute. All parties were given complete opportunity to file pleadings, to present whatever exhibits, documents, materials and affidavits they so desired, to argue the matter fully before the Commissioner and to file and exchange briefs. Only after all such material and briefs were submitted by the parties did the Commissioner of Education make his decision, based on the entire record before him. This is the same procedure which has been followed in

literally thousands of appeals brought before the Commissioner of Education for decision in the past.

Associate Judge Stanley H. Fuld, in the Court of Appeals Opinion on this matter, in which all judges of the Court concurred, summed up the feeling of the Court on the question on constitutionality as follows:

"Section 588, subdivision 1 [a], of the Civil Practice Act sanctions an appeal to this court as of right only if there is 'directly involved the construction of the [state or federal] constitution.' Quite obviously, and we recently so held in a case very similar to the present one, the Commissioner of Education's resolution of a dispute on conflicting affidavits without an oral hearing neither directly involves the construction of the constitution nor poses a constitutional question of any kind. (See *Matter of Kuhn v. Commissioner of Education*, 2 N. Y. 2d 749.)"

On the same subject, the aforesaid Opinion of the Appellate Division has this to say:

"The petitioners complain that the Commissioner did not hold a hearing and that therefore they did not have an opportunity to present evidence in support of their contentions. There is no provision in the statute which requires the Commissioner to hold a quasi-judicial hearing or to receive evidence. The nature of the procedure upon an appeal to the Commissioner is left entirely to the Commissioner's discretion. The regulations which he has adopted pursuant to section 311 of the Education Law provide for oral argument, the filing of briefs and the submission of affidavits but they do not provide for a hearing at which evidence may be introduced.

"There can be no doubt as to the validity of the Commissioner's regulations. No question of due process of

law is involved. The legislature has plenary power over the educational system of the State and it may authorize the Commissioner to decide an appeal with respect to a school matter without holding a quasi-judicial hearing . . . ."

The Commissioners of Education of the State of New York over the years have decided fairly and impartially thousands of appeals relating to school matters which were brought pursuant to the provisions of Section 310 and the Rules of Practice drawn up by the Commissioner pursuant to Section 311. There is nothing in this procedure which is repugnant to the Constitution of the United States. On the contrary, the Constitutional safeguards on behalf of the individual are specifically preserved in the aforesaid statutes and rules.

In so far as Section 2037 of the New York State Education Law is concerned, there appears to be no basis for questioning the constitutionality of the Legislature's action in prescribing that the Commissioner of Education, as the head of the State's public educational system, shall settle in finality all disputes concerning the validity of any district meeting or election or of any of the acts of the officers of such meeting or election. The Commissioner is probably the best-qualified person in the State to decide such disputes, which undoubtedly is the reason the Legislature has placed this responsibility on him.

The Appellant William C. Murphy apparently was displeased with the outcome of the vote on the above-mentioned school construction project, but he has had his fair and just chance to present his viewpoints and to have his claims of irregularity decided legally by competent authority. His further displeasure with the result of his appeal does not make the procedure on appeal to the Commissioner of Education unconstitutional.

His assertion of "the participation of twenty-four unauthorized voters" in the voting on the proposition is sheer speculation. There is no evidence that a single unauthorized person voted. There is no proof of fraud, nor is there even a claim that fraud existed.

There appears to be no basis for Appellant's claim that the Commissioner's decision and order were unconstitutional.*

Appellant has been treated fairly, equitably and impartially in this entire matter. He has not been deprived of or denied any of his constitutional rights.

CONCLUSION

For the foregoing reasons it is respectfully urged that the appeal herein should be dismissed.

Respectfully submitted,

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* It is to be noted that the provisions of Education Law § 310 have been construed by the New York Court of Appeals, most recently in *Board of Education, et al. v. Allen*, 6 N.Y. 2d 127. The Court has pointed out that the decisions of the Commissioner of Education decided under this section will not be reversed unless they are "purely arbitrary".

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 419

In the Matter
of
DONALD O'BRIEN and WILLIAM C. MURPHY,
Appellants,
vs.
THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,
Respondent.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

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ARGUMENT.

POINT I.

The appeal to the Supreme Court of the United States is timely.

A.

Proceedings in the New York Courts involving appeal and applications for leave to appeal.

In the light of the argument advanced by the respondent, an explanation of the proceedings in the New York Courts would seem to be in order.

The appeal to the Court of Appeals was taken under § 588 of the Civil Practice Act of the State of New York upon the grounds that there was directly involved the construction of the Constitutions of the State of New York and the United States. The majority opinion dismissing the appeal made it crystal clear that all that the Court of Appeals had decided upon that appeal was the absence of a substantial constitutional question.

(See Majority Opinion, Fuld, J., 4 N. Y. 2d 140; reprinted in Appendage D of Appellant's Jurisdictional Statement at pages 45-48).

Desiring a decision of the *whole* case and not solely the constitutional issues, the appellant sought to appeal by leave of the courts. In New York, an appeal by leave brings up to the Court of Appeals *every* question of law which was properly raised and preserved upon the trial.

(*Commercial Bank v. Sherwood*, 162 N. Y. 310, 56 N. E. 834, Carmody Wait Cyclopedia of New York Practice, Vol. 9; page 416 and cases cited therein).

First, appellant sought leave to appeal to the Court of Appeals from the Appellate Division, Third Department, and following denial by that Court, thence from the Court of Appeals. This procedure is specifically authorized under § 592, Subdivision 5(b) of the Civil Practice Act.

"§ 592, Subdivision 5(b) of the C. P. A. provides: An application in the Appellate Division for permission to appeal may be made returnable at the term of the Appellate Division during which an order of the Court of Appeals dismissing an appeal taken as of right was entered, or at the next succeeding term, provided that appeal lies pursuant to such permission and that the proceedings have not been improperly delayed. An application in the Court of Appeals for permission to appeal subject to the same provisions

may subsequently be made as authorized in Subdivision 3 of this section".

The appellant's application to the Appellate Division for leave to appeal was timely taken. Appellant did not utilize the extended time granted him under the statute (§ 592, subd. 5(b)), to wit, until the "next succeeding term" of the Appellate Division. Rather, he made that application as expeditiously as possible. The order of the New York Supreme Court entered on the remittitur of the Court of Appeals was dated April 25, 1958. A copy with notice of entry was served upon appellant on April 27, 1958. On April 28, 1958, *one (1) day thereafter*, motion to the Appellate Division for leave to appeal to the Court of Appeals was made. Appellant submits such application was timely and expeditiously made.

Similarly, appellant's application addressed to the Court of Appeals for leave to appeal was timely taken. The statutes, § 592, Subd. 3 and Subd. 5(b) C. P. A., authorized a thirty-day period "after service of a copy of the order of the Appellate Division." The order of the Appellate Division denying leave to appeal to the Court of Appeals was dated May 19, 1958. The respondent did not enter that order in the County Clerk's Office until July 23, 1958. A copy was not served upon appellant until July 26, 1958. On August 21, 1958, well within the thirty-day period, appellant served by mail the application for leave to appeal.

The respondent, Commissioner of Education, in opposing both applications for leave to appeal, did not raise any objection to the timeliness of either the application to the Appellate Division or to the Court of Appeals for leave to appeal. Neither did any Court raise any question that the respective applications had been "improperly delayed".

The point we press here is that the appellant did not torture the time granted under the statutes to institute proceedings taken after the decision of the Court of Appeals. Each application was made more promptly and expeditiously than required.

On this same score, we respectfully invite the attention of the Court to the fact that approximately four months of the "one year and five days" delay complained of by the respondent was caused and occasioned by the tardy conduct of the respondent. To particularize:

(A) The order of the Court of Appeals dismissing the appeal on the grounds that there was not involved a constitutional question was entered in the Court of Appeals on March 27, 1958. The respondent, as the successful party is the only recipient of the order of the Court of Appeals. The respondent delayed in securing and entering an order of the Supreme Court on the order and remittitur of the Court of Appeals until April 25, 1958. The respondent did not serve a copy of that order upon the appellant until April 27, 1958. This was one (1) month after the same could have been accomplished.

(B) The order of the Appellate Division denying appellant leave to appeal was granted on May 19, 1958. That order was not entered in the Clerk's Office by the respondent until July 23, 1958. A copy was not served upon the appellant until July 26, 1958. This was some two and one-half (2½) months later than necessary.

(C) The order of the Court of Appeals denying appellant leave to appeal was entered in the Court of Appeals on October 16, 1958. It was not entered in the County Clerk's Office until October 31, 1958, nor was it served upon the appellant until November 3, 1958. This was a delay of an additional one half (½) month.

B.

Proceedings in the New York Courts involving application for re-hearing.

After the Court of Appeals denied appellant leave to appeal, only two avenues remained open for appellant to pursue. They were (1) application for re-hearing to the Court of Appeals on the constitutional questions presented on the first appeal, or (2) appeal to the Supreme Court of the United States. Convinced, after further research, that the grievance complained of was as violative of the "due process" clause of the New York State Constitution as it was of the Constitution of the United States, the appellant marshalled additional case law support and applied to the Court of Appeals for re-argument and re-hearing. This was a conscientious attempt by the appellant to exhaust all of his available state remedies. This is a practice which appellant understood and now understands has repeatedly been recommended and required by the Supreme Court of the United States. For example in *Market Street Railroad Co. v. Railroad Commission*, 324 U. S. 548, 551, the Supreme Court, in speaking of the State Court judgment, said:

> "It must be subject to no further review or correction in any other state tribunal * * *".

(See also Supreme Court Practice, Stern and Gressman, Second Edition, pages 64-65).

C.

Respondent's Argument Considered.

What the respondent is actually urging in the motion to dismiss the appeal herein is that the Supreme Court of the United States re-write the rules and procedural requirements of the Court of Appeals of New York. He concedes that there is no fixed time requirement for filing a petition

for a re-hearing under Rule XX of the Rules of Practice of the Court of Appeals. He further concedes that the appeal to the Supreme Court of the United States was taken within the applicable rules of that Court.

Yet he urges the argument "Since there is no statutory period for filing a motion for re-argument in the Court of Appeals of the State of New York, there actually is no such thing as a timely or untimely petition for re-hearing." As a consequence, he urges that the ordinary rule extending the time to appeal to the Supreme Court should not be applied. This is a sophistic approach. It is an attempt to have the same results flow from the absence of a time limitation on a re-hearing procedure as would flow from the absence of a re-hearing procedure altogether.

D.

Absence in New York Court of Appeals of time restriction for re-hearing.

While appellant has not found any definitive statement of why the highest Court in New York has not fixed a definite time limitation for re-hearings, the nature and type of proceedings which are often re-heard suggest the answer.

Review in capital criminal cases upon facts occurring subsequent to the Court's decision, consideration of some allegedly decisive point claimed to have been overlooked by the Court, re-appraisal of an action in the light of a supervening and inconsistent decision of the United States Supreme Court, further consideration of cases involving questions of profound public interest are examples in point.

(See Powers of the New York Court of Appeals by Cohen and Carger, revised edition, pages 696-697, and cases cited therein).

To the end that justice may be done, that a wrong may be corrected, that there may be uniformity in the application of the law, and that important decisions may be reached only after the fullest consideration, the Court of Appeals permits re-hearings.

Obviously the fixing of a definite time limitation in the cited examples would frustrate the very purpose of a re-hearing procedure.

Further, appellant knows of no rule which would prevent the Court of Appeals of New York from *dismissing* an application for a re-hearing in certain instances instead of entertaining the same and then granting or denying the application.

Franklin Bank Note Co. v. Charles W. MacKay, 158 N. Y. 683 is the only discovered case informative on the question. There the Court of Appeals stated at page 684:

> "There is a very general misapprehension as to the practice of the Court on motions for re-argument or to amend the remittitur. It is often erroneously assumed that after the filing of the remittitur in the Court below, and order entered thereon, this Court is deprived of all jurisdiction in the cause".

After citing several illustrations wherein the Court had resumed jurisdiction by entertaining applications for re-hearing, the Court stated:

> "This later practice of the Court is not necessarily inconsistent with the earlier cases which hold that this Court has no jurisdiction to grant a re-argument or an amendment of the remittitur after the remittitur is filed and *acted upon in the Court below* * * * (citing cases). *It is competent for this Court to determine whether it will resume jurisdiction for any purpose* * * *." (Italics mine.)

In the light of the above language, it would seem that every application for a re-hearing is not automatically en-

tertained by the Court of Appeals, but is subject to a residuum of discretion in the Court of Appeals even under Rule XX of that Court.

Whether or not this be true it has long been a general tenet of the law that when no time has been fixed, a reasonable time will be the rule.

It is submitted that it makes no difference whether the entertainment of appellant's application for re-hearing was premised (1) upon a right afforded appellant under the rules of the Court of Appeals, or (2) upon discretion exercised by that Court because the order had not been "acted upon in the Court below", or (3) upon discretion because an unreasonable time had not elapsed. The important fact is the application was entertained by the Court of Appeals.

E.

Notice of Appeal to the Supreme Court of the United States.

In *Gypsy Oil Company v. Leo Bennett Escoe*, 275 U. S. 498, 48 S. Ct. 212, 72 L. Ed. 393, a petitioner had timely filed a petition for a re-hearing in the Supreme Court of Oklahoma. The petition for a re-hearing was denied by the Supreme Court of Oklahoma on June 14, 1927. Later, on August 2, 1927, the petitioner sought leave to file a second petition for a re-hearing. Leave to file the second petition was denied. Within three months after denial of the motion for leave to file, but more than three months after the denial of the first petition for a re-hearing, the petitioner filed a writ of certiorari in the Supreme Court of the United States.

The Court held that the timely filing of the first petition for a re-hearing suspended the three months' appeal pro-

vision, but that the filing of the motion for permission to file a petition for a re-hearing did not. The Court distinguished between the denial of a motion for leave to file a petition for a re-hearing and the denial of a petition for re-hearing. It said:

> "The running of the time within which proceedings may be initiated here to bring up judgment or decree for review is suspended by the seasonable filing of a petition for re-hearing. But it begins to run from the date of denial of such petition and further suspension cannot be obtained by the mere presentation of a motion for leave to file a second request for a re-hearing. (*Morse v. U. S.*, 270 U. S. 151, 153, 154; 70 L. Ed. 518, 519, 520; 46 Sup. Ct. Rep. 241).
>
> "If, however, a timely motion for leave to file a second petition is granted and the petition is actually entertained by the Court, then the time within which application may be made here for certiorari begins to run from the day when the Court denies such second petition."

In the case at bar, the appellant made only one application to the Court of Appeals for a re-hearing. It was timely made under New York practice. The petition for re-hearing was entertained by the Court of Appeals and denied after consideration by that Court. It is conceded in the respondent's brief that the present appeal to the Supreme Court of the United States was made within ninety days after the denial of the petition for re-hearing. Certainly, if an appeal to the Supreme Court would be timely, if taken within ninety days after the denial by the highest state court of a *second* petition for re-hearing, it is timely if taken after the denial of the first petition for re-hearing.

Contrary to the arguments of the respondent, it affirmatively appears that decisions of the Supreme Court of the United States have evolved two separate rules regard-

ing timeliness of an appeal to that Court. Each rule is applicable to and supports the present appeal.

The first rule is as follows: Where a petition for a rehearing is filed before the time for a petition for review has expired, it tolls the running of the time for appeal to the Supreme Court of the United States and the limitation upon proceedings for review begins from the date of denial of the petition for review in the State Court. This rule has been established by the following cases, among others:

Morse v. U. S. (1926), 270 U. S. 151, 46 Sup. Ct. 241, 70 L. Ed. 518; re-hearing denied 295 U. S. 768, 55 S. Ct. 828, 79 L. Ed. 1709;

Gypsy Oil Co. v. Escoe (1927), 275 U. S. 498, 48 S. Ct. 112, 72 L. Ed. 393;

United States v. Seminole Nation, 299 U. S. 417, 57 S. Ct. 283, 81 L. Ed. 316;

Department of Banking v. Pink (1942), 317 U. S. 264, 63 S. Ct. 233, 87 L. Ed. 254; re-hearing denied 318 U. S. 802, 63 S. Ct. 850, 87 L. Ed. 1166;

Leishman v. Associated Wholesale Electric Co. (1943), 318 U. S. 203, 63 S. Ct. 543, 87 L. Ed. 714; re-hearing denied 318 U. S. 800, 63 S. Ct. 758, 87 L. Ed. 1163;

Market Street R. Co. v. Railroad Commission (1945), 324 U. S. 548; 65 S. Ct. 770, 89 L. Ed. 1171; re-hearing denied 324 U. S. 890, 65 S. Ct. 1020, 89 L. Ed. 1438;

See also Annotation, American Law Reports Annotated, 10 A. L. R. 2d 1075 at 1079, and cases cited therein;

Papanikolau v. Atlantic Freighters, 232 Fed. 2d 663.

The above rule is applicable to the case at bar because the appellant complied with the time limitations of the New York Court of Appeals in making application for a re-hearing.

The second rule is as follows: Even though a petition or motion for re-hearing is not filed until after the expiration of the period limited for appeal, if such a petition or motion is filed in good faith and is entertained and considered on its merits, an appeal to the Supreme Court of the United States taken within the statutory period after disposition of such motion or petition, is timely. This rule is established by the following cases:

Wayne United Gas Co. v. Owens-Illinois Glass Co. (1937), 300 U. S. 131, 57 S. Ct. 382, 81 L. Ed. 557;

Bowman v. Loperena (1940), 311 U. S. 262, 61 S. Ct. 201, 85 L. Ed. 177;

Bernards v. Johnson (1941), 314 U. S. 19, 62 S. Ct. 30, 86 L. Ed. 11;

Pfister v. Northern Illinois Finance Corp. (1942), 317 U. S. 144, 63 S. Ct. 133, 87 L. Ed. 146; rehearing denied 317 U. S. 714, 63 S. Ct. 523, 87 L. Ed. 568;

See also Annotation, 10 A. L. R. 2d 1075 at 1092, American Law Reports Annotated;

Papanikolou v. Atlantic Freighters, 232 Fed. 2d 663.

The above rule is applicable to the case at bar, because the Court of Appeals of the State of New York entertained and considered appellant's application for a re-hearing.

POINT II.

The appeal herein does present a substantial Federal question.

In addition to the Matter contained in appellant's jurisdictional statement heretofore filed, the appellant submits two propositions for the Court's consideration.

Proposition No. 1. A "*sine qua non*" to a democratic form of government is a fair election procedure. An election procedure which permits twenty-four unauthorized voters to participate in an election carried by a majority of only eight votes is not a fair election procedure.

Proposition No. 2. A "*sine qua non*" to any judicial procedure is the according to the litigants at some stage the opportunity to be heard. A judicial procedure which precludes the rights to present evidence, to know the claims of the opposing party, to meet the claims of the opposing party, to cross examine the opposing party and his witnesses, does not accord an opportunity to be heard.

The case at bar arises out of that most sensitive of state agencies, its Department of Education. Centuries ago, Diogenes observed, "The foundation of every state is the education of its youth". Appellant submits that in the light of recent events, no agency of a state should be more free from autocracy or more lacking in absolutism than its Department of Education. It is submitted that the administration of its affairs should be subject to the closest scrutiny and the most rigid censorship should be applied to the slightest deviation from democratic practices.

While the case at bar involves a property right, it is well to recall that in the Constitution, the word "property" is

only one word removed from "liberty". It is submitted that today's hue and cry for administrative efficiency in regard to property rights will be tomorrow's wail against administrative oppression in regard to personal freedom.

CONCLUSION.

The motion to dismiss the appeal should be denied. The appeal should be allowed.

Respectfully submitted,

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